No. 84-262

In The
Supreme Court of the United States
October Term, 1984

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THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,

Petitioner,

v.

PUEBLO OF SANTA ANA,

Respondent.

—o—

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR RESPONDENT

—o—

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STATEMENT OF THE CASE

Introduction

The Pueblo of Santa Ana is one of nineteen Indian tribes in New Mexico called Pueblos, a term distinguishing them for their centuries-old stone and adobe villages and a communal way of life based largely upon irrigated agriculture.[1]

This case arose from efforts of the Bureau of Indian Affairs in the late 1970s to identify damage claims on behalf of Indian tribes, especially trespass matters, that would be barred by the statute of limitations contained in 28 U.S.C. §2415.[2] Early in that process, the government identified rights-of-way purportedly authorized under Section 17 of the Act of June 7, 1924, ch. 331, 43 Stat. 636 (hereinafter, the Pueblo Lands Act) as a significant category of probable Pueblo trespass claims. Because the interpretation of Section 17 that had led to the right-of-way grants cast doubt on the status of the Pueblo Indians, and because of the government's hesitance in filing suit.

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[1] *See generally*, 9 *Handbook of North American Indians* (1979).

[2] Prior to the original enactment of 28 U.S.C. § 2415, in 1966, there was no limitation period for damage claims brought by the United States on behalf of Indian tribes. That section imposed a six-year and ninety-day limitation period on such claims, and provided that claims arising before the statute, the so-called "old claims," had to be filed within six years and ninety days from the statute's enactment. Due to government inaction with respect to the old claims, the limit for filing them was repeatedly extended, but Congress grew increasingly insistent on action on the claims, estimated to number in the thousands. *See Covelo Indian Community v. Watt*, 551 F. Supp. 366, 369 (D.D.C. 1982), *aff'd*, 10 Ind.L.Rep. 3008 (D.C. Cir. 1982). As a result of Congress' latest effort to deal with this problem, see Pub.L. 97-394, 96 Stat. 1976 (1982), the identified claims have been listed at 48 Fed. Reg. 13698-13920, 51204-51268 (1983).

the Pueblo of Santa Ana brought this case on its own in 1980.

Although 79 rights-of-way were granted over Pueblo land under Section 17 (compared with 779 under other authority), App. 1, only about 50 were determined to present viable trespass claims. *See* 48 Fed. Reg. 13891-13899 (1983). Since this case was filed, most of these have been resolved. For example, Petitioner Mountain States Telephone & Telegraph Co. (also known as Mountain Bell), has settled almost all of its trespass claims, and of the 26 rights-of-way it acquired under Section 17 only two lines remain standing, one of which has been reauthorized under valid authority. App. 2. Most other companies still using easements originally granted under Section 17 have renegotiated those easements under valid authority.[3] *Amicus* Atchison, Topeka & Santa Fe Railway Co. (AT&SF), whose briefs make disingenuous claims of disrupted interstate rail service and costly track relocation if the decision below stands (AT&SF *Cert.* Br. at 2-4; AT&SF Br. at 2-3), actually has less than a quarter of its main line track across Pueblo lands under Section 17.[4] App. 1-3. Contrary to AT&SF's grandiose assertions about having to rebuild its line over the mountains, no existing line has ever

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[3] For example, amicus Public Service Company of New Mexico (PNM), whose brief claimed that the decision below threatens its statutory duty "to provide efficient and reasonable electric service generally," PNM Br. at 3, has renegotiated all but one of its Section 17 rights-of-way, and the remaining one expires by its terms in 1986. App. 3.

[4] Most of that mileage is at Acoma and Laguna. The Section 17 deeds for that trackage were incorporated into "Final Decrees" entered by consent in the quiet title suits filed under the Pueblos Lands Act, *United States v. Arvizo*, No. 2079 Equity (D.N.M. May 14, 1931), and *United States v. Armijo*, No. 2080 Equity (D.N.M. Nov. 2, 1931), and thus AT&SF may well have defenses to trespass claims with respect to those deeds not available to Mountain Bell here. *See* discussion *infra* at 45-48.

had to be relocated outside Pueblo lands in the settlement of these claims, nor do the Pueblos have any interest in such a result. AT&SF (like *amicus* State of New Mexico) may, at the most, have to negotiate lawful rights-of-way for a few short sections of its line.

Settlement of these claims has been aided by a realization that trespass damages for the claims, if any, would probably be nominal. App. 5-7. In short, the hyperbole about uprooted titles and economic upheaval must be disregarded. On its merits, this case is virtually moot. What Petitioner and *amici* are evidently seeking in this proceeding is a ruling that will place the Pueblos in a unique status, stripped of the federal law protections afforded other Indian tribes for their lands and water rights.[5]

This action presents the question whether Congress, in a statute expressly intended to confirm its guardianship of Pueblo lands and to preclude their loss or alienation, at the same time granted to the Pueblos or their individual members broad power to alienate those lands merely upon approval by the Secretary of the Interior.

Procedural History

This case is before this Court on interlocutory appeal after the district court rejected Petitioner's motion for summary judgment and entered partial judgment for San-

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[5] The effect of the Pueblo Lands Act is a key and hotly litigated issue in the first adjudication of Pueblo water rights, *New Mexico v. Aamodt*, 537 F.2d 1102 (10th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1977), No. 6639M (D.N.M.), which has been before the courts since 1966. *Amici* State of New Mexico and PNM are primary litigants in that proceeding. *See* PNM Br. at 3-4, n. 9; *and see generally*, C. Dumars, M. O'Leary, A. Utton, *Pueblo Indian Water Rights: Struggle for a Precious Resource* (1984) (hereinafter, *Pueblo Water Rights*). The presiding judge in *Aamodt* also decided the instant case in the district court.

ta Ana.[6] (J.A. 85-94). The district court found Mountain Bell's position anomalous in view of the purpose of the Act, and concluded that Section 17 was simply a declaratory reaffirmation of Congress' guardianship. *Id.*

The court of appeals affirmed on the basis of the literal meaning of Section 17, emphasizing the long-standing position of this Court and the Tenth Circuit that the Pueblos "'are subject to the legislation of Congress enacted for the protection of tribal Indians and their property,'" particularly the Nonintercourse Act, 25 U.S.C. § 177. (J.A. 102, quoting *United States v. Chavez,* 290 U.S. 357, 362 (1933).) The court of appeals rejected the proffered agency interpretation of Section 17 because it conflicted with the "plain congressional intent" of Section 17.[7]

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[6] Mountain Bell argued in part that the fact of conveyances of rights-of-way under Section 17 by the Department of the Interior constituted a binding administrative interpretation of Section 17, to which the courts should defer. Santa Ana responded that it planned to adduce further factual evidence on that issue, but that Section 17's plain meaning was clear and dispositive. Because the district court agreed, no further factual evidence was placed in the record. At the time, the Bureau of Indian Affairs had contracted to have an eminent historian of the Pueblo Lands Act period, Prof. Lawrence C. Kelly, research the history and implementation of the Act, with particular emphasis on Section 17. The study was completed after the district court decision. Because Petitioner and *amici* now rely so heavily on the asserted administrative interpretation of Section 17, Santa Ana has lodged this report, entitled, *Section 17 of the Pueblo Lands Act: A Study of Legislative History and Administrative Practice,* and its accompanying exhibits—all documents from public archives—with the Clerk, and served copies on all parties. It is referred to herein as the Kelly Report, and the documents are cited by their exhibit numbers.

[7] The only evidence on administrative practice before the court of appeals was the number of Section 17 conveyances, the dates for the first and last such conveyances, and deposition exhibits on nine Section 17 rights-of-way at Santa Ana. In its reply brief on appeal, Mountain Bell requested a "limited remand" on the issue of administrative practice, but the court decided that the plain intent of Congress controlled the case.

Status of the Pueblos Prior To The Pueblo Lands Act

Following the accession of the Southwest to the United States by the Treaty of Guadalupe-Hidalgo, 9 Stat. 922 (1848), the first Indian agent for New Mexico (and the first territorial governor), James S. Calhoun, reported that encroachments by non-Indians on Pueblo lands demanded immediate attention. A. Abel, *The Official Correspondence of James S. Calhoun* (Office of Indian Affairs 1915), *passim.*[8] Calhoun urged that the laws governing trade and intercourse with Indian tribes be immedately extended to New Mexico for the Pueblos' protection. *Id.* In 1850 he was authorized to negotiate a treaty with several Pueblo tribes, including Santa Ana, in which they accepted the trade and intercourse laws and the United States promised to "adjust and settle, in the most practicable manner the boundaries of each Pueblo, which shall never be diminished . . . ." *Id.* at 237-246.

The treaty was never submitted to Congress and Calhoun died while enroute to Washington with a delegation of Pueblo leaders to lobby for it. *Id.* at 540. Congress did, however, in 1851, specifically declare the Indian tribes in the Territory of New Mexico subject to the trade and intercourse laws. Act of February 27, 1851, ch. 14, § 7, 9 Stat. 587.

Federal efforts to protect Pueblo property against the non-Indian depredations decried by Calhoun were frustrated by the territorial courts, which held that the Pueblos were not Indian tribes within the scope of federal law.

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[8] This volume was distributed to Committee members during hearings on the Pueblo Lands Act, and excerpts were reprinted. *Hearings on S. 3855 and S. 4223 Before a Subcomm. of the Senate Comm. on Public Lands and Surveys,* 67th Cong., 4th Sess. 18-25, 28-29, 124-131 (1923) (hereinafter, 1923 Senate Hearings).

New Mexico v. Aamodt, 537 F.2d 1102, 1105 (10th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1977). *United States v. Lucero*, 1 N.M. 422 (1869), specifically held that the Non-intercourse Act did not apply to the Pueblos, largely because of judicial notice that they were not really "Indians." *Id.* at 452-453.

Federal officials nonetheless continued efforts to protect Pueblo lands, and in 1876 brought two cases before this Court seeking to overturn the *Lucero* decision and establish that the Pueblos were within the Nonintercourse Act. Instead, the Court embraced *Lucero*, reciting "a few well-considered sentences of the opinion" in that case, and concluding that because of their status the Pueblos were not subject to the trade and intercourse laws. *United States v. Joseph*, 94 U.S. 614 (1877).

Following *Joseph* the Pueblos were increasingly subjected to territorial law and continued to lose possession of their lands.[9] After *United States v. Mares*, 88 P. 1128 (N.M. 1907), held that the Pueblos' status placed them beyond the federal liquor statutes, Congress declared in the New Mexico Enabling Act of June 20, 1910, ch. 310, § 2, 36 Stat. 557, 558, that "Indian country" "shall also include all lands now owned or occupied by the Pueblo Indians of New Mexico." Congress also required New Mexico to disclaim all right and title to all lands

[9] See *Nambe v. Romero*, 10 N.M. 58, 61 P. 122 (1900). When Congress created the Court of Private Land Claims, Act of March 3, 1891, c. 539, 26 Stat. 854, allowing for adjudication of land titles arising under Spain and Mexico, the Pueblos were considered ineligible under *Joseph* for legal representation by the government. The Court of Private Land Claims rejected ninety-eight percent of all acreage claimed by the Pueblos in cases filed under that Act. White, Koch, Kelly & McCarthy, *Land Title Study*, 228-234 (New Mexico State Planning Office 1971).

> owned or held by any Indian or Indian tribes the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the absolute jurisdiction and control of the Congress of the United States.

Id. On the strength of the Enabling Act, the government brought a criminal indictment in 1911 for bringing liquor onto a Pueblo, but the federal district court held the relevant portion of the Act void because of the Pueblos' status under the *Joseph* decision. *United States v. Sandoval*, 198 Fed. Rep. 539 (D.N.M. 1912). This Court reversed. Addressing "the status of the Pueblo Indians and their lands," the Court found that the Pueblos are "Indians in race, customs, and domestic government . . . dependent upon the fostering care and protection of the Government, like reservation Indians in general. . . ." *United States v. Sandoval*, 231 U.S. 28, 38-41 (1913). Congress therefore had full power to legislate for them. The Court attributed the *Joseph* decision's observations respecting the Pueblos to inaccurate information provided by the territorial court. *Id.* at 48-49.

Sandoval technically involved the application of the Indian liquor laws to the Pueblos, but its conclusions about the status of the Pueblos demolished the rationale of the *Joseph* decision and imperiled the titles of thousands of non-Indians who had settled on Pueblo lands. A movement for congressional action on those claims grew after the government surveyed the lands occupied by non-Indians within the Pueblo grants and filed several omnibus ejectment suits in 1919 and 1920.[10] In order to resolve

[10] In a companion suit brought to cancel a 1919 oil and gas lease of the entire Isleta Pueblo reservation, the New Mexico

(Continued on following page)

title conflicts created by the belated disapproval of *Joseph*, Congress asserted its power as guardian of the Pueblos, and after considering the problem for four years, in 1924 enacted the Pueblo Lands Act. *See* Lawrence C. Kelly, *The Assault on Assimilation; John Collier and the Origins of Indian Policy Reform* 163-300 (1983) (hereinafter, *Assault on Assimilation).*

The Pueblo Lands Act

The Pueblo Lands Act asserted the legal rights of the Pueblos to their lands, through the United States, and recognized the equities of non-Indian settlers by means of a federal statute of limitations for adverse possession. *United States v. Wooten,* 40 F.2d 882, 885 (10th Cir. 1930). An administrative body, the Pueblo Lands Board, applied the limitations initially, and unsuccessful title claimants could then plead them in subsequent suits to quiet Pueblo titles. Old deeds were not validated, but rather constituted only color of title for adverse possession. Claims arising after 1902 were cut off completely on the premise that the Enabling Act gave notice that it was impossible to acquire Pueblo lands. H.R. Rep. No. 1748, 67th Cong., 4th Sess. 7 (1923). Other provisions of the Act helped to restore and consolidate Pueblo lands. Sections 1, 3, 6, 8, 14, 16,

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district court rejected defendant's challenge to federal authority over Isleta's lands and cancelled the lease, holding that the Pueblo could not convey because "the Enabling Act gives Congress absolute jurisdiction and control over the disposal of the lands of the Pueblo Indians," *United States v. Campbell,* No. 709 Equity (D.N.M. Orders filed November 17, 1921 and March 6, 1923). *See* 1923 Senate Hearings at 155. The United States was represented in the case by Ralph Emerson Twitchell, one of the major architects of the Pueblo Lands Act. Not until the decision in *United States v. Candelaria,* 271 U.S. 432 (1926) was it definitely established that Pueblo lands were inalienable prior to passage of the Enabling Act.

19. When the Act's implementation led to charges of unfairness to the Pueblos, Congress amended it extensively. Act of May 31, 1933, ch. 45, 48 Stat. 108.

Conveyances Under Section 17

Prior to and following the Pueblo Lands Act, the Department of the Interior believed the general right-of-way statutes for Indian lands applied to the Pueblos and it granted rights-of-way across Pueblo land in accordance with them. (J.A. 71-72; Kelly Report, p. 21.) A review of the information provided to Congress in the 1923 hearings on the Pueblo Lands Act shows that Congress likewise believed these generally applicable Indian statutes included the Pueblos. 1923 Senate Hearings, *supra,* n. 8, at 72-75, 154-155; *Hearings on H.R. 13452 and H.R. 13674 Before the House of Rep. Comm. on Indian Affairs,* 67th Cong., 4th Sess. 40-41 (1923) (hereinafter, 1923 House Hearings). Consequently, rights-of-way were not addressed by the Act. The government attorney detailed to conduct the quiet title suits under the Act decided, however, that the general right-of-way statutes did not apply to Pueblo land, and in one of the first quiet title suits to be brought under the Pueblo Lands Act he sued a company that had a right-of-way granted pursuant to the general statutes. The defendant company was seeking refinancing from Chicago bond houses at the time, and its attorneys pressured local federal officials to acquiesce in an interpretation of Section 17 in which the last clause of the section would be taken to mean that interests in Pueblo lands could be conveyed if the Secretary of the Interior approved. Kelly Report, *supra,* n.6, pp. 20-26.

The first use of Section 17 for this purpose did not occur until April, 1926, nearly two years after the Act

was passed, and shortly before the decision in *United States v. Candelaria,* 271 U.S. 432 (1926). (J.A. 188.) The great majority of the 79 rights-of-way approved under Section 17 were issued in the brief period between 1926 and 1933. Petitioner itself acquired 26 easements under Section 17, one third of the total. App. 1-2. There have been no conveyances relying on Section 17 since 1959. *See* Kelly Report, pp. 38-39.

The Mountain Bell Right-of-Way

Mountain Bell's predecessor constructed a telephone line, the Denver-El Paso Toll Line, across Santa Ana's "El Ranchito" tract in about 1905, without consent from the Pueblo or the United States or payment of consideration.[11] The company was joined as a defendant in *United States v. Brown,* No. 1814 Equity (D.N.M. May 31, 1929) (the quiet title suit filed on behalf of Santa Ana under the Pueblo Lands Act), but it never answered or appeared in the case. Instead it went directly to the Pueblo and obtained the Tribal Council's consent for an easement for which it paid $101.60. The Pueblo received no compensation for the 23 years of trespass. (J.A. 38-43.)[12] The

[11] Mountain Bell, for the first time in this litigation, asserts in its brief that it obtained a right-of-way from Santa Ana in 1905 whose validity was later "cast in doubt." Pet. Br. at 3, and n. 1. In response to a request for admissions, however, Mountain Bell conceded that it could not produce "any document to establish conclusively that it or a predecessor in interest obtained a right-of-way across Santa Ana lands from the Santa Ana Pueblo or the Department of the Interior in the period 1900-1926 . . ." This response, apparently inadvertently omitted from the Joint Appendix, is set forth at App. 8-9. A letter produced by Mountain Bell in discovery, reproduced at App. 10 (responding to the letter reproduced at J.A. 71-72), indicated that in 1928 the company had not realized this portion of its line was on Indian land at all.

agreement was submitted to the Secretary for approval under Section 17. When the United States attorney learned that the easement had been approved, he promptly dismissed Mountain Bell from *U.S. v. Brown.* (J.A. 66-68.)

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SUMMARY OF ARGUMENT

It is a truism of federal Indian law that understanding "requires more than textual exegesis." Felix Cohen, *Handbook of Federal Indian Law* (1942 ed.) at xxxii. The purpose and effect of Section 17 of the Pueblo Lands Act can only be discerned from an understanding of the overall purpose of that Act, seen against the distinctive historical and legal background of the Pueblo Indians. The fundamental flaw in Petitioner's argument, that Section 17 may be viewed as a broad grant of authority for conveyances, is that it ignores the context. It isolates a single clause of a complex statute, and converts it into an independent and extraordinary grant of authority that subverts the purpose of the entire Act. And the only justification for this approach is a strained comparison with a sentence from the Nonintercourse Act.

The meaning of Section 17 becomes clear when read in context as Congress' declaratory underscoring of this Court's landmark decision in *United States v. Sandoval,* 231 U.S. 28 (1913). Section 17 was a broadly phrased proclamation in an otherwise refined statute that quieted Pueblo titles and created assiduously limited provisions for acquiring title to Pueblo lands. Interpreting Section

[12] Although Petitioner insists that Santa Ana undersood and agreed that under Section 17 such a conveyance was valid if approved by the Secretary, given that none of the Pueblo's officers could even sign his name (the original of the easement shows that they thumbprinted it), it is doubtful that the Pueblo had any notion of these subtle legalisms. *Cf. Choctaw Nation v. Oklahoma,* 397 U.S. 620, 630-631 (1970).

17 as a grant of power to alienate Pueblo lands distorts the language of the section, conflicts enormously with the design of the Act, and perforce causes absurd consequences. Petitioner's interpretation is, moreover, a radical departure from established legal principles and other statutes governing Indian land transactions, which are explicit and limit administrative discretion. The revisionist interpretation of Section 17 as authority to convey, was not contemporaneous and was reluctantly adopted only as an accommodation of private interests who wanted Indian lands without having to comply with the strict rule of law. Conveyances under Section 17 were clustered within a short time frame and manifest a disharmonious application. Deference to the interpretation is inappropriate. Finally, the very few Section 17 lines involved in quiet title suits under the Act were dismissed with the intent of circumventing those suits. That the order of dismissal at issue herein was not on the merits is illustrated by the later ruling of the court that the Pueblo Lands Act conferred no jurisdiction over rights-of-way. Res judicata has no application.

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ARGUMENT

I. SECTION 17 OF THE PUEBLO LANDS ACT WAS A REAFFIRMATION OF THE FEDERAL GUARDIANSHIP OVER PUEBLO LANDS, NOT A GRANT OF POWER TO CONVEY THOSE LANDS.

Section 17 of the Pueblo Lands Act can only be understood in context. We begin, thus, by setting out the statutory context, and showing how other provisions of the Pueblo Lands Act, its history, and Congress' manifest purpose, to reestablish full federal guardianship over the Pueblos and their lands, utterly refute the interpretation

of Section 17 asserted by Petitioner. We next examine the history and language of Section 17 itself, explaining its primarily declaratory purpose and meaning, discuss the illogic of Petitioner's analysis of the language, and show the absurd consequences that flow from that analysis. We then consider the hopeless conflicts between Section 17 as portrayed by Petitioner and Congress' consistent practice respecting conveyances of Indian lands. Finally, we explain how the asserted administrative record of Section 17's use to validate conveyances of Pueblos' lands is entitled, under numerous decisions of this Court, to no deference here.

A. The Pueblo Lands Act and its legislative history manifest Congress' intention to prevent future losses of Pueblo lands, not facilitate them.

The central issue in this case is whether Congress intended, by the second clause of Section 17 of the Pueblo Lands Act, to give the nineteen Pueblo tribes a power possessed by no other Indian tribe—the power to alienate their lands freely, subject only to the approval of the Secretary of the Interior. An examination of the Act's overall purposes compels the conclusion that Congress had no intention to grant any such power in that provision.

A statute cannot be interpreted from isolated clauses, but must be construed as a whole, as part of an "overall legislative plan." *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412 (1968). As this Court said in *Richards v. United States*, 369 U.S. 1, 11 (1962):

> We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole Act, and that in fulfilling our responsibility in interpreting legislation, "we must not be guided by a single sentence or member of a sentence, but [should]

look to the provisions of the whole law, and to its object and policy."

(quoting from *United States v. Boisdore's Heirs,* 49 U.S. (8 How.) 113, 122 (1850)).

The Pueblo Lands Act was an express act of guardianship, predicated upon and ratifying this Court's decision in *United States v. Sandoval,* 231 U.S. 28 (1913), which reversed years of erroneous treatment of the Pueblos as not Indians. *See, United States v. Chavez,* 290 U.S. 357, 361, 362 (1933). The Act's stated purpose was to quiet the titles of the Pueblo Indian tribes, through the United States as guardian, and it recognized the government's liability for past failures to protect Pueblo property. Additionally, the Act set up a means for consolidating Pueblo lands (Sections 8, 16), preserved grant overlaps for the Pueblos (Section 14), and required the purchase of replacement lands and water rights (Section 19). Section 17, like Section 1, affirmed the guardianship of the United States. *United States v. Univ. of New Mexico,* 731 F.2d 703, 706 (10th Cir. 1984), *cert. denied,* — U.S. — (1984).

For non-Indians the legislation was "an act of grace," *Garcia v. United States,* 43 F.2d 873, 878 (10th Cir. 1930), which afforded a strictly defined and limited class of non-Indians who had occupied Pueblo lands but had acquired no rights, a one-time opportunity to obtain title, according to exacting terms that were long-debated and painstakingly defined. Section 17 must be construed in light of these limited means of transferring Pueblo titles. Section 4 specifies federal limitations provisions in positive, express language: "all persons claiming title to, or ownership of [Pueblo lands] may . . . plead limitation of action as follows. . . ." The criteria, adverse possession with color of title since 1902, or without color of title since 1889,

coupled with payment of taxes, were to be applied preliminarily by an administrative board in making a report on each Pueblo's lands. Claimants found not to have met the criteria were joined as defendants in the suits to quiet Pueblo title that followed the Board's reports, in which they were allowed to plead the limitations directly.

Under Section 13, a Board finding that a claimant met one of the limitations provisions, was followed by the filing of field notes and plats by the Secretary, which constituted "conclusive evidence of the extinguishment" of Pueblo title to such lands. Subsequently, a patent or certificate of title would issue having the "effect of a relinquishment by the United States of America and the said Indians." Claimants who proved they satisfied the Section 4 criteria in the quiet title suits were, under Section 5, entitled to a decree having the "effect of a deed of quitclaim" from the United States and the Indians.

Both of these methods of conveying Pueblo titles are explicit, limited, and non-discretionary. They apply clear-cut rules of law contained in a federal adverse possession statute. Claims originating after 1902 were cut off totally. Broad, discretionary power to convey Pueblo lands outside these detailed procedures conflicts egregiously with this conscious design. *See* 1923 Senate Hearings at 161, 164-166, 184; 1923 House Hearings at 46-47, 149, 272-278.

Congress supplied but one other method in the Act by which non-Indians could acquire Pueblo land, in Section 16, whose wording and legislative history demonstrate Congress' purpose in the Act to prevent further losses of Pueblo land. Section 16 disproves Petitioner's interpretation, for if Section 17 is construed to be the grant of authority contended for, then Section 16 is superfluous. *See Bernier v. Bernier,* 147 U.S. 242, 246 (1893).

The language of Section 16 is narrow, affirmative, and unambiguous, in contrast to the broadly prohibitive purport of Section 17:

> Sec. 16. That if any land adjudged by the court or said lands board against any claimant be situate among lands adjudicated or otherwise determined in favor of non-Indian claimants and apart from the main body of the Indian land, and the Secretary of the Interior deems it to be for the best interest of the Indians that such parcels so adjudged against the non-Indian claimant be sold, he may, with the consent of the governing authorities of the Pueblo, order the sale thereof, under such regulations as he may make, to the highest bidder for cash. . . .

Section 16 first appeared in the Bursum Bill of 1922, S. 3855, 67th Cong., 2d Sess., App. 32, and, although restrictive, was vehemently opposed by the Pueblos and the Indian rights organizations, who feared that it could lead to further losses of Pueblo land. *See, Assault on Assimilation,* 211-254. That section was, therefore, subjected to careful congressional scrutiny and revision. 1923 Senate Hearings, at 105-106, 154-155. Contrary to the implication in the United States Brief, at 17, the colloquy at pp. 154-155 of the 1923 hearings, pertained to Section 16, *not* Section 17, which had not yet been proposed. Senator Lenroot asked whether there were any circumstances where it would be in the interest of the Indians that their land be sold. The answer, offered by Senator Jones, was yes, in one instance, where strips of unextinguished Pueblo land are left isolated or interspersed among lands awarded to non-Indians. 1923 Senate Hearings at 154. It was these strips that Senator Lenroot suggested should "be sold or alienated with the consent of both the Pueblo and the Secretary of the Interior," *id.* at 155, leading to what became Section 16 of the Act, which authorized the Secretary to sell these remote tracts under promulgated regulations, with Pueblo consent, and only when deemed in the best interest of the Indians. Significantly, as the Senate colloquy indicates, this is the sole circumstance in which Congress saw any need to authorize the sale of Pueblo land.[13]

It is absurd to suppose that Congress, after deliberately tightening the conditions imposed by Section 16, suddenly repealed those restrictions by granting the Pueblos unconditioned power to alienate their lands, subject only to the signature of the Secretary or a delegated subordinate. Such irrational results obviously cannot be imputed to Congress.

It is thus ironic that Petitioner justifies its interpretation primarily on the ground that it saves the second clause of Section 17 from meaninglessness. Pet.Br. at 12, 18. Significance should, if possible, be accorded all parts of a statute, but converting the second clause of Section 17 into a grant of authority renders *all* of Section 16 a nullity.

By enacting the Pueblo Lands Act, Congress sought to rectify the damage created by this Court's disavowed decision in *Joseph.* Over the course of four years, Congress carefully refined legislation employing restrictive and positively stated terms in fulfillment of its professed

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[13] Congressional intent to use Section 16 as the sole means of selling Pueblo land is established more clearly by the fact that in 1933 Congress amended and broadened the section to allow sale of any land adjudged against any private claimant, but leaving in place all of the other conditions. Act of May 31, 1933, ch. 45, §7, 48 Stat. 111. This amendment would obviously have been an "anomaly," U.S. Br. at 17, n.8, if Section 17 had the meaning argued for by Petitioner. There is no evidence that Congress was made aware in the slightest that Section 17 had been construed to consume Section 16. See App. 37-38.

role as guardian of the Pueblos. There is no evidence whatever to indicate that Congress intended to resurrect *Joseph* or relieve the Pueblos of the guardianship so clearly enunciated by *Sandoval,* as is contended by Petitioner and *amici* AT&SF and State of New Mexico. In view of the purpose and structure of the Pueblo Lands Act, it is anomalous to conclude that Congress intended the broadly prohibitive terms of Section 17 as authority to alienate Pueblo lands.

B. Section 17 was intended by Congress to ratify the implications of Sandoval and reaffirm the status quo reflected in the Enabling Act and the Nonintercourse Act.

The meaning of Section 17 must be determined by the intent of Congress. The language of Section 17 originated outside the government and was added expeditiously to what became the final bill in February, 1924. Kelly Report, *supra,* n. 6, pp. 10-12, Exs. 1-11. It was drafted by Francis Wilson (a Santa Fe attorney for one of the Indian rights organizations lobbying for the bill), who described it as

> the shortest way to prevent existing conditions from recurring or existing again. . . . This section is intended to cover the same ground as Section 2116 of the Revised Statutes [the Nonintercourse Act] but it is changed so as to accord with the conditions of the Pueblo Indians.

Kelly Ex. 7. Almost alone among other provisions of the bill, the language of Section 17 was undiscussed, undisputed, and unamended.[14] Kelly Report, pp. 13-14.

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[14] Indian Commissioner Burke expressed concern to Wilson that proposing the three new sections Wilson had drafted (in-

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Section 17 reads, in a single sentence,

> No right, title, or interest in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished as hereinbefore determined shall hereafter be acquired or initiated by virtue of the laws of the State of New Mexico, or in any other manner except as may hereafter be provided by Congress, and no sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto, made by any Pueblo as a community, or any Pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico, shall be of any validity in law or in equity unless the same be first approved by the Secretary of Interior.

By its own terms Section 17 contains no authority for the conveyance or alienation of interests in Pueblo lands, nor does it purport to modify or remove any existing restrictions. The negative language simply adds to restraints already in effect ("*No* right, title or interest shall . . . be acquired . . . *and no* sale, grant, lease . . . shall be of any validity . . ."). The two clauses logically are cumulative, read literally, connected by the conjunction "and." The first clause by its terms prohibits any transfer of title to Pueblo lands, whether with Pueblo concurrence or not, "except as may hereafter be provided by Congress."[15] It

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cluding Section 17) so late might cause Congress to think something was being put over on them. Kelly Exs. 5, 6. That Section 17, alone among the three new sections, was proposed and accepted, indicates that Congress did not view the section as raising any new concerns. That most certainly would not have been true had the section been meant as broad authority for conveyances. *Cf.* Kelly Report, *supra,* n. 6, p. 14.

[15] This construction is supported by the only other congressional reference to Section 17, which restated the section without the comma separating the two clauses, indicating that the section was understood to have a unified meaning. S. Rep.

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is plainly this clause that Wilson drafted "to accord with the condition of the Pueblo Indians": it specifically precludes any further losses of Pueblo lands as had happened in the past, by deeds, adverse possession under New Mexico law, or otherwise. The second clause deals only with conveyances of Pueblo lands, and as has been noted, Pet. Br. at 29; U.S. Br. at 15, its structure resembles that of the first sentence of 25 U.S.C. §177 (the Nonintercourse Act). Petitioner and *amici,* however, urge that the substitution of the Secretary for Congress in that structure transforms this clause from a declaration of principle to a broad delegation of Congress' power over conveyances of Pueblo land to the Secretary. As is discussed elsewhere, *supra* at 14-18, *infra* at 24-32, that construction finds no support anywhere in the legislative history or purpose of the Act, the structure of the section, or Congress' normal practice in overseeing conveyances of Indian land.

The more sensible interpretation of the second clause is that it merely references the numerous statutes—such as the various right-of-way statutes enacted near the turn of the century, 25 U.S.C. §§311-321, the leasing statutes, 25 U.S.C. §§ 393, 396, 397, 398, and the timber sales statute, 25 U.S.C. § 407—by which Congress had modified the Nonintercourse Act so as to permit certain types of conveyances of Indian land under Secretarial supervision. Wilson

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No. 492, 68th Cong., 1st Sess. (1924) at 11; Kelly Report p. 13. Petitioner views the comma separating the two clauses as the equivalent of a period, in effect making the section into two sentences. Pet.Br. at 17. *See United States v. Palmer,* 16 U.S. (3 Wheat.) 610, 636 (1818) (Johnson, J., concurring). The first clause controls the section.

The Solicitor General claims that the term "acquired" refers to actions by others to obtain interests in Pueblo lands without Pueblo consent. U.S. Br. at 14, *and see* Pet. Br. at 19. This is contrary to common usage. "Acquisitions" of property typically involve sales. *See, e.g., Black's Law Dictionary* (5th ed. 1979) at 23.

plainly was aware of these statutes, since at the time the Interior Department was approving leases and rights-of-way on Pueblo lands under them, a fact made known to Congress during hearings on the Act. Thus understood, the second clause of Section 17 merely recites that conveyances of Pueblo lands must have Secretarial approval *where Congress has authorized the Secretary to approve conveyances*—an updated reaffirmation of the full applicability of the Nonintercourse Act as it stood in 1924.[16]

Section 17 is thus correctly viewed as simply a declaratory reaffirmation of the law as it stood at the time. *Bryan v. Itasca County,* 426 U.S. 373, 391 (1976). Almost thirty years ago the court of appeals examined Section 17 in *Alonzo v. United States,* 249 F.2d 189, 195 (10th Cir. 1957), *cert. denied,* 355 U.S. 940 (1958)[17], concluding that it

> insured that restrictions implicit in the decision in *United States v. Sandoval* . . . would continue in force.

Rejecting the argument that the New Mexico Enabling Act modified the Nonintercourse Act, the court added that even if such were the case, the restrictions of the Nonintercourse Act "were clearly reimposed by §17 of the Act

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[16] Similarly, the reference to sales by individual Pueblo members may well have been intended as a reference to the possibility of allotment, which was still, in 1924, an aspect of federal Indian policy. Allotees could sell their allotments under existing statutes, with Secretarial approval. 25 U.S.C. §349.

[17] The 10th Circuit panel in *Alonzo* consisted of the author of the opinion below herein, Hon. Jean Breitenstein; Chief Judge Sam G. Bratton, a former United States Senator from New Mexico and Senate sponsor of the 1928 Pueblo right-of-way act, 25 U.S.C. §322, and the 1933 amendments to the Pueblo Lands Act, Act of May 31, 1933, ch. 45, 48 Stat. 108; and former Chief Judge Orie Phillips, who was one of the two federal district court judges who heard the suits to quiet title under the Pueblo Lands Act, and who, upon his elevation to the court of appeals in 1929, heard many of the appeals under the Act.

of 1924." *Id.* at 196. The uniquely experienced panel in that case plainly viewed Section 17 as an affirmation of the Nonintercourse Act, the Enabling Act, *Sandoval,* and *Candelaria,* and not as in any way departing from them.[18]

The view of Section 17 as an affirmation of existing law was presented to this Court by the Solicitor General in the *Candelaria* case, a little over a year after the Act was passed. After discussing *Sandoval* and the Enabling Act, the government noted the Pueblo Lands Act and emphasized Section 17 as being especially exemplary of the federal guardianship over Pueblo lands. Brief for the United States at 10-11 (Kelly Ex. 18). With Section 17 squarely presented to it, this Court ruled in *Candelaria* that the Nonintercourse Act applied fully to the Pueblos and had since 1851. *Candelaria,* 271 U.S. at 441-42. The opinion did not view Section 17 as supplanting or superseding the Nonintercourse Act, as Petitioner would now have the Court rule.[19]

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18 Felix Cohen called Section 17 "the final step . . . in assimilating pueblo lands to the status of other tribal lands." Cohen, *Handbook of Federal Indian Law* 390 (U.N.M. reprint of 1942 ed.). The most recent edition of Cohen's treatise calls Section 17 a specifically targeted supplement to the general restraint on alienation of the Nonintercourse Act. Cohen (1982 ed.) at 516, n. 47. A recent commentary on Pueblo water rights describes Section 17 as assuring that "no interest in [Pueblo] lands could thereafter be acquired without congressional approval." *Pueblo Water Rights, supra,* n. 5, at 57.

19 Numerous cases since *Candelaria* have reiterated that the Pueblos are and always have been fully within the embrace of the Nonintercourse Act, contrary to the assertion of *amicus* PNM. PNM Br. at 3, n. 2. *Pueblo of Santa Rosa v. Fall,* 273 U.S.

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Viewing Section 17 as generally declaratory accords with historic practice. *Bryan,* 426 U.S. at 391-392. The Nonintercourse Act is itself declaratory and largely redundant. In *Johnson v. McIntosh,* 21 U.S. (8 Wheat.) 543, 604 (1823), Justice Marshall took note of the various laws prohibiting purchases from the Indians, which were technically unnecessary because the Indians did not hold fee title, and described those laws as declarations of national policy. *Cf. Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 210 (1978), *Oneida Indian Nation v. County of Oneida,* 414 U.S. 661, 667-670 (1974). Similarly, this Court has viewed disclaimer clauses in state enabling acts as affirming existing law and preserving the status quo. *Arizona v. San Carlos Apache Tribe,* 103 S.Ct. 3201, 3211-3212 (1983); *Three Affiliated Tribes v. Wold Engineering,* 104 S.Ct. 2267, 2275 (1984). Placed in the context of the Nonintercourse Act and the New Mexico Enabling Act, Section 17 is most comprehensible if viewed as preserving the status quo represented by those statutes and the *Sandoval* decision.

As shown by the final committee reports on the bill, Congress legislated on the basis of the conclusion, later affirmed by this Court, that the Pueblos were "not competent" to alienate their property. H.R. Rep. No. 787, 68th Cong., 1st Sess. 2-4 (1924); S. Rep. No. 492, 68th Cong.,

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315, 320 (1927); *United States v. Chavez,* 290 U.S. 357, 363-364 (1933); *United States v. Board of National Missions,* 37 F.2d 272, 274 (10th Cir. 1929); *Garcia v. United States,* 43 F.2d 873, 878 (10th Cir. 1930); *Alonzo v. United States,* 249 F.2d 189, 194-196 (10th Cir. 1957), *cert. denied,* 355 U.S. 940 (1958); *New Mexico v. Aamodt,* 537 F.2d 1102, 1109 (10th Cir. 1976) *cert. denied,* 429 U.S. 1121 (1977); *Plains Elec. Gen. & Trans. Co-op v.. Pueblo of Laguna,* 542 F.2d 1375, 1376 (10th Cir. 1976); *United States v. University of New Mexico,* 731 F.2d 703, 706 (10th Cir. 1984), *cert. denied,* — U.S. — (1984).

1st Sess. 3, 4 (1924).[20] Section 17 was primarily intended to reiterate that principle.

This Court has already described the intent of the Pueblo Lands Act as an assertion of guardianship over the Pueblo tribes. *United States v. Chavez,* 290 U.S. 357, 362 (1933). Restriction on alienation is the essential feature of that guardianship. *United States v. Mitchell,* 445 U.S. 535, 542-544 (1980). Viewing the Pueblo Lands Act "in light of common notions of the day," *Oliphant,* 435 U.S. at 206, guardianship implied that the Pueblos were wards, were ***non sui juris,*** and were not competent to convey their lands. (J.A. 19, ¶ 4.) By declaring its guardianship over the Pueblos, Congress intended to assert its power and consolidate its control over the Pueblos and their lands, not to relieve or emancipate them. *Cf., United States v. Waller,* 243 U.S. 452, 459-60 (1917).

C. Petitioner's interpretation of Section 17 is convoluted, creates redundancies, and leads to anomalous consequences, all in defiance of common sense explanation.

Notwithstanding the evident purpose of Section 17, in both its literal meaning and in the context of the Act, Petitioner seeks to transform it into a vast transfer of power over Pueblo lands. Joined by *amici,* Petitioner urges that if the first clause is confined to involuntary loss of Pueblo land, the second clause stands out as a grant of unqualified power to the Pueblos to convey their lands voluntarily,

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[20] That the Pueblos were understod, after *Sandoval,* not to have any power to alienate their lands was repeatedly pointed out during the Committee hearings. App. 11-31. *And see,* H.R. Rep. No. 787, 68th Cong., 1st Sess. 2-4 (1924); H.R.Rep. No. 1748, 67th Cong., 4th Sess. 7 (1923). Nowhere did Congress indicate an intention to restore the Pueblos to their assumed pre-*Sandoval* status, as Petitioner would have this Court do now, and as *amicus* State of New Mexico urges was intended. N.M. Br. at 5-7. *And see* AT&SF Br. at 13, n.10.

with the approval of the Secretary (a function that can be delegated to low-level bureaucrats, *Bailey v. Bannister,* 200 F.2d 687 (10th Cir. 1952)). But that argument is merely tautological: the inference that the first clause must be limited in its application solely to involuntary losses derives entirely from the reference in the second clause to conveyances. Petitioner would have the meaning of the second clause depend upon a change in meaning of the first clause which, in turn, is inferred from the second clause. Because the first clause covers all transfers of interests without qualification, its meaning cannot be changed by inference, and such tautological reasoning, in any event, must fail.

Petitioner's argument is largely exegesis on Section 17's internal structure and word-for-word comparison with one sentence of the Nonintercourse Act. The imputation of the word "involuntary" to the first clause creates the very problems Petitioner claims to resolve. If the first clause was only intended to exclude state law, then the phrase "or in any other manner except as may hereafter be provided by Congress" is superfluous. Pet. Br. at 24. The whole clause would be rendered superfluous, anyway, because the Enabling Act had already accomplished that goal. If the first clause is also taken to address congressionally authorized losses, then it is a redundant declaration that Congress shall not act until Congress acts. Section 17 thus makes sense only if taken as Congress intended, as express confirmatory notice of the trust status of the Pueblos' lands.[21] That fact and the expeditious in-

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[21] Additionally, the words "or any title or claim thereto" in the second clause are probably meaningless under any interpretation of Section 17, unless the word "of" be imputed to make it parallel to the Nonintercourse Act, or unless the phrase

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corporation of the Section into the final bill evince a broadly declaratory purpose for Section 17, not a mechanism for future administration of Pueblo lands.

Seeking some support for their interpretation, Petitioner and the Solicitor General seize on Francis Wilson's statement, Kelly Ex. 7, that in drafting Section 17 he "changed" the Nonintercourse Act "to accord with the conditions of the Pueblo Indians." They argue that the "change" referred to was a radical delegation to the Secretary, in the second clause of the section, of the totality of Congress' power to regulate conveyances of Pueblo lands. Pet. Br. at 28-30; U.S. Br. at 19. This baseless contention overlooks the obvious. It is the *first* clause, which has no parallel in the Nonintercourse Act but which addresses specifically the unhappy past experience of the Pueblos, that Wilson noted as his alteration of the Nonintercourse Act. *See* discussion *supra* at 19-21.

Petitioner's interpretation could have subverted the entire scheme of the Pueblo Lands Act, and it was so used to vitalize certain claims based on old deeds from the Pueblos. All such deeds, made without congressional authority, were void. *Pueblo of Santa Rosa v. Fall,* 273 U.S. 315, 320 (1927); *Franklin v. Lynch,* 233 U.S. 269, 271-273 (1914). Nonetheless, deeds from the Pueblos of Laguna and Acoma to the Atchison, Topeka and Santa Fe Railroad (and its predecessor) between 1880 and 1922 were simply submitted to the Secretary for approval under Section 17. Kelly Report, pp. 39-41, Exs. 101-106. The railroad thus escaped defending its titles in accordance with

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is construed to relate back to the first clause. U.S.Br. at 12-13. Most likely this phrase is simply evidence of the carelessness with which Section 17 was drafted, and therefore also evidence of an admonitory and less substantive objective.

the Act, and the Pueblos received no compensation for the lands lost. It is certain Congress never intended that Section 17 paralyze the remainder of the Act's provisions.

Petitioner's interpretation of Section 17 further raises serious questions about Congress' action in 1928, definitely applying the general Indian right-of-way statutes to Pueblo lands. 25 U.S.C. § 322.[22] If rights-of-way could be conveyed under Section 17, one would expect that fact at least to be mentioned in the legislative history, if not the language of the 1928 Act, yet Congress acted on the understanding that there was then no authority for rights-of-way over Pueblo lands, and that Act was intended to comprehensively cover the field. *Plains Elec. Gen. & Trans. Co-op v. Pueblo of Laguna,* 542 F.2d 1375, 1378-1379 (10th Cir. 1976). Similarly, in 1968 Congress amended 25 U.S.C. § 415, to permit leases of lands of Cochiti, Pojoaque, Tesuque and Zuni Pueblos for up to 99 years. Pub.L. 90-570, 82 Stat. 1003. Such legislation would have been totally unnecessary if Section 17 has the meaning asserted here, for it would permit leases of unlimited duration, or outright sales.[23]

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[22] During consideration of the Pueblo Lands Act, Congress was informed that the general Indian right-of-way and leasing statutes applied to Pueblo lands, 1923 Senate Hearings at 72-75; 154-155; 1923 House Hearings at 40-41, and it referenced those statutes in Section 17 of the Act. *See* discussion *supra,* at 20. It was the government attorney handling the quiet title suits who decided (perhaps wrongly; *see F.P.C. v. Tuscarora Indian Nation,* 362 U.S. 99, 111 (1960), and *id.* at 127-128 (Black, J., dissenting)) that those statutes did not apply, leading Congress to think new authority was needed. Kelly Report, pp. 20-22.

[23] The United States inconsistently contends that while Section 17 should be interpreted as authority for conveyances, the conveyances permitted ought to be limited to rights-of-way since that is the extent of the administrative practice and as-

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Petitioner's construction of Section 17 as positive authority (rather than a reference to such authority as then existed) would necessarily embrace conveyances of Pueblo lands "made by . . . any Pueblo Indian living in a community of Pueblo Indians," yet Pueblo lands, like other tribal lands are held communally.[24] Individual Indians have no vendible or undivided interest in Pueblo lands and cannot convey what they do not own. *Franklin v. Lynch*, 233 U.S. 269, 271 (1914). Petitioner's reasoning thus either gives Section 17 a superfluous meaning or leads to a ridiculous implication of authority for allotment to individuals, which the Pueblo Lands Act most certainly did not effectuate.

D. Interpreting Section 17 as authority for conveyances would be contrary to Congress' consistent practice with respect to conveyances of Indian tribal lands.

Petitioner's interpretation would constitute a major exception to—not a reaffirmation of—the Nonintercourse Act and all other federal statutes governing conveyances of interests in tribal lands, and would make Pueblo lands,

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serted congressional "ratification". U.S. Br. at 26-27. That no "ratification" of this interpretation can be imputed to Congress' subsequent actions is shown *infra*, at 38, n. 35. And the administrative practice included resort to Section 17 to approve outright sales of Pueblo land. Kelly Report, pp. 41-44. Regardless, either Congress intended the section to permit conveyances of all types or it did not. The United States seems to admit that Congress did not intend it as such authority, and merely asks the Court to excuse Section 17's use to validate rights-of-way.

[24] Petitioner accepts this conclusion and even argues that individuals can convey. Pet.Br. at 25, n.18.

alone among the lands of all other Indian tribes, completely marketable.[25]

Statutes must be construed in conformity with the well settled policy of the government, but Petitioner's interpretation contravenes several established policies: it results in abdication by Congress of its own historic authority over Indian land transactions without express language to that effect, *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649 (1976); *Chippewa Indians v. United States*, 307 U.S. 1, 5 (1939), and gives the Secretary of the Interior unprecedented discretion to approve sales of tribal lands.

As this Court said in *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 75, 86 (1976) (quoting Cohen (1941 ed.), at 94, 97), control by Congress of tribal lands has been " 'one of the most fundamental expressions, if not the major expression, of the constitutional power of Congress over Indian affairs . . .' " *And see Weeks* at 83. In-

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[25] There is no inconsistency in the Pueblos wanting to insure the applicability to their lands of the full array of federal restrictions on alienation. Like other tribes, the Pueblos as communities take the long view in wanting to preserve their homelands. Bitter experience prior to the Pueblo Lands Act, and even more recently, *see, e.g.*, Reid P. Chambers and Monroe Price, *Regulating Sovereignty: Secretarial Discretion and the Leasing of Indian Lands*, 26 Stanford L.Rev. 1061 (1974), has shown that tribal councils can be induced to agree to unwise conveyances. A single such transaction could cause the total loss of the land base, and the ultimate disappearance of the tribal entity. Reposing an unconditioned, delegable power of approval in the Secretary, moreover, may not provide adequate protection against improvident transactions. *Id., and see*, Kelly Report at 24, and Ex. 39, p. 4. That was particularly true in 1924. Albert Fall, who had resigned as Secretary in 1923, had been notorious for his efforts to open Indian lands to miners and other non-Indian developers. *Assault on Assimilation* at 152-159. Characteristically, it is non-Indian entities such as Petitioner and *amici* who argue for "emancipation" of the Pueblos.

cluded in that power is the exclusive right to extinguish Indian property rights. *Ibid.; United States v. Santa Fe Pac. Ry Co.*, 314 U.S. 339, 347 (1941); *Solem v. Bartlett*, 104 S.Ct. 1161, 1166 (1984).

Unless Congress itself clearly expresses a contrary intent, Indian legislation must be read to reserve Congress' authority. *Hollowbreast*, 425 U.S. at 656. The policy of restricting conveyances of tribal land is based upon a judgment "that such purchases are opposed by the soundest principles of wisdom and national policy." *Johnson v. McIntosh*, 21 U.S. at 543, 604. A matter of such national importance cannot be deemed to have been delegated without express statement of Congress,[26] yet nowhere in Section 17 is there language even suggestive of a conferral of authority, let alone the direct language characteristic of a grant of such power. *See Southern Pacific Transportation Co. v. Watt*, 700 F.2d 550, 554 (9th Cir. 1983), *cert. denied*, 104 S.Ct. 393 (1983). If Congress had intended to confer broad discretionary authority to approve sales of Pueblo lands it would have been straightforward in doing so. *Bryan*, 426 U.S. at 390; *Aamodt*, 537 F.2d at 1111.[27]

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[26] This high standard has not, however, been so true of individual Indian allotments issued under the General Allotment Act, Act of Feb. 18, 1887, c. 119, 24 Stat. 388, and similar Acts and treaties, the purpose of which were ultimately to wean allotees away from their tribal origins and assimilate them into the mainstream culture. Alienation of allotments is relatively easy. *See, e.g.*, 25 U.S.C. §§ 349, 372. For that reason, cases such as *Pickering v. Lomax*, 145 U. S. 310 (1892), relied on by Petitioner, devoid of context, are of no relevance here.

[27] The argument that in the second clause of Section 17 Congress deliberately aped the Nonintercourse Act's language, merely substituting the Secretary for Congress as the authorizing entity, Pet.Br. at 29-31, U.S.Br. at 15-16, fails for just that reason. There is a vast difference between Congress saying that Indian land may not be alienated until it (Congress) acts, and Congress delegating its entire power in that regard to the Secretary. So profound a transfer of power would certainly have been announced more clearly.

Significantly, other statutes granting authority for alienation consistently authorize only grants of limited interests in Indian lands, for designated purposes.[28] Section 17 contains no limitations at all—if construed as a grant of power, it would allow complete alienation of Pueblo lands, hypothetically all Pueblo lands, without restriction, for any reason. *See Plains Electric Generation and Transmission Cooperative v. Pueblo of Laguna*, 542 F.2d 1375, 1381 (10th Cir. 1976).

Congress has, moreover, invariably included in statutes authorizing conveyances of interests in tribal lands detailed conditions, or provision for issuance of regulations to govern such conveyances. *See, e.g.*, 25 U.S.C. §§ 312, 319, 321, 323, 396b. It did just that in Section 16 of the Pueblo Lands Act. This practice has a protective purpose, and is imposed by Congress even on minor transactions, yet Section 17 is devoid of such protective language and sets no restraints on the tribes or the Secretary. There is not even any requirement that the Pueblos receive reasonable compensation for conveyances. In this regard, it is significant that Section 17 was never codified in Title 25 of the United States Code, as one would expect if it had the operative significance attributed it by Petitioner.

The Pueblo Lands Act must be construed in light of the "undisputed existence of a general trust relationship" that "has long dominated the Government's dealings with Indians," *United States v. Mitchell*, 103 S.Ct. 2961, 2972 (1983). That relationship, clearly reaffirmed in the Act,

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[28] They also use clear, express language delegating the power to convey. *See, e.g.*, 25 U.S.C. § 311: "The Secretary . . . is authorized to grant permission" for public highways. Similar language is found throughout the sections of Title 25 dealing with conveyances of interests in tribal lands, *e.g.*, §§ 311-323, §§ 396a-415.

insures that statutes impairing special rights of Indians, especially property rights, will be the product of an actual legislative choice, manifested by a clear and plain expression of congressional intent. Cohen (1982 ed.) at 222-224; *Menominee Tribe of Indians v. United States,* 391 U.S. 404, 412-413 (1968); *Mattz v. Arnett,* 412 U.S. 481, 504-505 (1973).

This settled judicial and congressional doctrine effectively accords tribes a right to "due process of lawmaking" to protect against "legislative accidents" and unintended injury, and assures accountability when Congress abandons its role as trustee. *Delaware Tribal Business Comm. v. Weeks,* 430 U.S. 73, 97-98 (1977) (Stevens, J., dissenting). Congress is presumed to deal with tribes in a straightforward and honorable manner, cognizant of its unique obligation, and never to intend to extinguish Indian property rights in a "backhanded way." *Menominee Tribe,* 391 U.S. at 412. The Court of Appeals was correct in invoking the canon that doubtful expressions are to be construed in favor of the Indians, for the construction of Section 17 championed by Petitioner is one of the most backhanded devices for extinguishing Indian property rights ever urged upon this Court.

E. There is no basis here for invocation of the doctrine of deference to administrative interpretation.

That the Department of the Interior actually acceded to the view that Section 17 provided authority for conveyances of Pueblo land, at least for a time, should not control this Court's interpretation of that section. Deference to an administrative interpretation of a statutory provision is proper only when Congress has delegated authority to the agency to resolve a question of interpretation. *Barlow v. Collins,* 397 U.S. 159, 165-66 (1970); *Chevron U.S.A. v. Natural Resource Defense Council,* 104 S.Ct. 2778, 2782 (1984); *see United States v. Vogel,* 455 U.S. 16, 24 (1982). Where the question goes to the existence of a delegated power, not just its discretionary exercise, independent assessment by the reviewing court is called for. Coffman, *Judicial Review of Administrative Interpretations of Statutes,* 6 W.N. Eng.L.Rev. 1 (1938).[29]

The question before this Court is whether Congress delegated broad power to the Secretary—clearly an issue as to the existence, not just the exercise of power. In the area of tribal property rights Congress has never before delegated to the Secretary of the Interior such unrestricted policy-making powers as is contended for in this case. *United States v. Arenas,* 158 F.2d 730, 747-48 (9th Cir. 1947), *cert. denied,* 331 U.S. 842 (1947); *see Chevron,* at 2781-2782. Such a delegation would be inconsistent with the otherwise carefully limited instances in which, under the Pueblo Lands Act, administrative officials could act to effectuate transfers of Pueblo title. *See* discussion *supra* at 14-18.

The circumstances here are not at all like those in *Chevron,* where this Court found that Congress did not intend to act on the specific issue (a highly technical issue in a highly technical regulatory statute) but instead left a "gap" for the interpreting agency to fill, and thus deference was proper; here, either Congress intended to delegate to the Secretary unqualified power to approve con-

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[29] This proposition is evident is *Chemehuevi Tribe of Indians v. Fed. Power Comm.,* 420 U.S. 394 (1975). At issue in that case was whether the Commission's statutory licensing authority over power generating facilities included licensing authority over two thermal-electric generating plants located on navigable rivers. Although the Court noted and ultimately agreed with the Commission's determination that it did not, *id.,* at 409-410, the Court's own statutory construction and assessment of congressional intent dominates the opinion.

veyances or it did not.[30] The existence of that power is therefore a matter for judicial interpretation, and the doctrine of deference to agency interpretation is inapplicable.[31]

Even were the doctrine of deference properly invoked in this case, it should be of little help to Petitioner. The agency interpretation is devoid of basic characteristics deemed important by this Court in determining whether deference is warranted. The agency interpretation of Section 17 displays a complete lack of soundness and consistency in its evolution, nor was there any cogent process that led to its adoption or implementation.[32]

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30 *Cf., F.E.C. v. Democratic Senatorial Campaign Committee,* 454 U.S. 27, 39 (1981); *E. I. DuPont v. Collins,* 432 U.S. 46, 52-57 (1977); *Columbia Broadcasting System, Inc. v. Democratic Nat'l Committee,* 412 U.S. 94, 103, 121-22 (1973). That Congress had left a "gap" for the interpreting agency to fill is evident in each of these cases. Also instructive is *United States v. Vogel,* 455 U.S. 16, 24-25 (1981), where this Court held that because a Treasury regulation was promulgated only under the Internal Revenue Commissioner's general authority to issue regulations, the regulation was owed less deference than one issued under a specific grant of authority. *And see, Rowan v. United States,* 252 U.S. 247, 253 (1981).

31 *See Barlow v. Collins,* 397 U.S. 159, 165-166 (1970), where this Court held that "since the . . . dispute relates to the meaning of the statutory term, the controversy must be resolved, not on the basis of matters within the special competence of the Secretary, but by judicial application of canons of statutory construction." *See also Piper v. Chris-Craft Industries, Inc.,* 430, U.S. 1, 41, n.27 (1977) (whether a cause of action should be implied from provisions of Securities Act was one "peculiarly reserved for judicial resolution").

32 In *F.E.C. v. Democratic Senatorial Campaign Committee,* 454 U.S. 27 (1981), this Court, in upholding the challenged agency practice, stressed that the thoroughness and consistency of the agency in making the administrative determination and implementing it are factors that bear on the amount of deference due agency action. *And see S.E.C. v. Sloan,* at 117; *Overton Park v. Volpe,* 401 U.S. 402, 415 (1971) *Adamo Wrecking Co. v. United States,* 434 U.S. 275, 287 n.5 (1978); *Sidmore v. Swift & Co.,* 323 U.S. 134 (1949).

The government attorney who first acquiesced in using Section 17 as approval for Pueblo land conveyances, George Fraser, initially interpreted the statutory provision as a complete bar to conveyances. Kelly Report, *supra,* n.6, pp. 21-23, Exs. 35, 38. Just two days prior to the meeting that settled upon the new interpretation of Section 17, Fraser repeated his view that

> . . . an act of Congress . . ., in my judgment, is the only way in which [the railroad] can obtain a legal right across the Pueblo. This is inevitable, in view of Section 17 of the Pueblo Lands Act above quoted.

Kelly Ex. 38.

The turnaround in the interpretation of Section 17, which occurred two years after its enactment, was the result not of some judicious enlightenment regarding the statute's construction but rather of low-level bureaucratic acquiescence to pressure from railroad and bond house lawyers. Kelly Report, pp. 23-36, Exs. 39-42. This doubtful and belatedly revised interpretation, invented by private lawyers and reluctantly accepted by the Interior Department, thus came out of convenience for the railroad and other companies faced with litigation over their questionable (or non-existent) rights-of-way across Pueblo lands. This process of decisionmaking cannot be characterized, as Petitioner contends, Pet. Br. at 35, as the kind of studied and detached problem-solving that gives weight to an agency interpretation. An interpretation that results from succumbing to pressure from private interests is not entitled to deference.

There were 79 rights-of-way granted under Section 17. The erratic record of these grants further indicates the dubious nature of this "administrative interpretation" as well as the tentative character of its implementation. Fifty-five of the 79 were granted during the period from 1926

to 1933, most of them to facilities that otherwise were thought subject to suit under the Pueblo Lands Act. After 1933, Section 17 conveyances were exceptional.[33] No conveyances were made under Section 17 after 1959 (and after 1946 Section 17 was used only for a group of canal rights-of-way that, but for their unlimited terms, complied fully with legitimate authority; Kelly Report, p. 38). Significantly, Interior approved a total of 779 rights-of-way under the 1928 Act and subsequent laws. App. 1. This pattern fails to establish a decisive, consistent, and longstanding administrative practice of the kind this Court has viewed with deference. *See e.g., Zenith Radio Corp. v. United States,* 437 U.S. 443 (1978) (Treasury regulation uniformly maintained over 80-year period); *Zemel v. Rusk,* 381 U.S. 1 (1965) (repeated, unquestioned imposition of area restrictions for foreign travel over 26-year period.)

Nor is there any basis for deferring to this ambivalent record on the ground that the Interior officials involved had a unique understanding of the Act derived from participating in its legislative process or by a particularly relevant expertise, factors considered important to this Court in *Chemehuevi Tribe of Indians v. Fed. Power Comm.,* 420 U.S. 394, 410 (1975) and *E. I. DuPont de Nemours & Co. v. Collins,* 432 U.S. 46, 56-57 (1977). *See also, Zuber v. Allen,* 396 U.S. 168, 192 (1969). The Pueblo Lands Act was the result of years of conflict and eventual compromise among numerous groups, including non-Indian settlers on the Pueblo lands, the Pueblo Indian tribes, the

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[33] The Solicitor of the Department of the Interior determined in the early 1940s that rights-of-way were to be granted under the general right-of-way statutes made applicable to the Pueblos by the 1928 Act, not under Section 17. Despite that, Section 17 was intermittently resorted to thereafter since it provided a means of circumventing legitimate statutory and regulatory authority. Kelly Report, pp. 38-39, Exs. 98-100.

New Mexico congressional delegation, various Indian rights organizations, and the Department of the Interior. Kelly Report, pp. 1-13. Interior was by no means the primary actor, however, and there is no evidence it had any role in drafting Section 17. *Id.* at 10-13, Exs. 1-3. *Cf. United States v. Clark,* 454 U.S. 555, 565 (1982) (deference where agency is primary architect of legislation). Furthermore, the Interior agents, who were acting under pressure from a railroad company to legitimate its rights-of-way across Pueblo lands, were clearly less competent to interpret Section 17 than are courts presented with an extensive and previously unexamined legislative history.

The disputed administrative interpretation of Section 17 is in any event a substantial departure from a long history of federal policy toward Indian lands and the intended meaning of the statute.[34] And it is Congress' intent that controls over any administrative interpretation. Courts should not follow administrative actions found to be inconsistent with the statutory mandate or underlying congressional policy. *Chevron* at 2781, and n.9; *S.E.C. v. Sloan,* 436 U.S. 103, 117 (1977); *Federal Maritime Commission v. Seatrain Line, Inc.,* 441 U.S. 726, 745 (1973). *Escondido Mut. Water Co. v. La Jolla Indians,* 104 S.Ct. 2105, 2114 n.22 (1984). Where the general principle of

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[34] The Solicitor General effectively admits to the revisionist character of this interpretation by asking the Court to find that Section 17 is valid authority for right-of-way conveyances *only.* U.S. Br. at 10, 17. Section 17 addresses all conveyances equally; rights-of-way, indeed, are one form of conveyance the section does *not* specifically list. There is no basis for treating rights-of-way differently based on statutory construction or as an assessment of congressional intent. This illogical effort by the United States to narrow the reach of a reversal of the decision below amounts to a concession that the interpretation of the section argued for by Petitioner (and developed in the asserted administrative practice) is wrong.

deference applies, it only "sets the framework for judicial analysis; it does not displace it." *United States v. Cartwright,* 411 U.S. 546, 550 (1973). This Court has firmly rejected the suggestion that an administrative determination be sustained simply because it is not "technically inconsistent with the statutory language where it is fundamentally at odds with congressional intent." *United States v. Vogel,* 455 U.S. 16, 24 (1981). The mere fact that a few of the hundreds of easements across Pueblo lands were, for reasons of expediency, purportedly granted under Section 17, fails to establish a conclusive interpretation. In *S.E.C. v. Sloan,* even though the practice was genuinely long-standing and supported by consistency, unlike here, this Court struck it down because it was manifestly wrong. *See also United States v. Midwest Oil Co.,* 336 U.S. 459 (1915) (executive cannot by course of action create a power). Nor does the mere passage of time validate unauthorized actions. *Cramer v. United States,* 261 U.S. 219, 234 (1923).[35]

Deference to the asserted administrative interpretation here would, by the controlling standards, be inappropriate. The faded administrative use of Section 17, characterized by shifting and doubtful reasoning, inconsistency and questionable judgments, should rather be taken as indicating that the interpretation was wrong.

[35] Conceding, in effect, that Congress never intended Section 17 as authority for conveyances, the Solicitor General argues that that interpretation was effectively ratified by Congress in 1926 and 1928. U.S.Br. at 24-26. This argument, based on mere conjecture regarding Congress' silence on the specific issue, is entirely without foundation. In cases where this Court has found congressional acquiescence in an administrative practice by its silence, the Court has relied on clear evidence that Congress knew of the practice at issue. *See, e.g., Power Reactor Devel. Co. v. Int'l Union of Elec. Workers,* 367 U.S. 396, 408 (1961) ("[administrative] construction has time and again been brought to the attention of the Joint Committee of Congress on Atomic Energy"); *Haig v. Agee,* 453 U.S. 280, 297 (1981) ("legislative history clearly shows awareness of the Executive policy.") In *Power Reactor Co.,* this Court said, "It may

(Continued on following page)

II. MOUNTAIN BELL'S DISMISSAL FROM UNITED STATES v. BROWN IS NO BAR TO THIS ACTION.

Mountain Bell argues that its dismissal from *United States v. Brown,* bars the present action. Res judicata principles do not apply, however, because the cause of action on appeal is not the same as that in *Brown,* there was no adjudication on the merits or litigation of the validity of the Section 17 right-of-way, there was no consent decree, and the court did not have jurisdiction to enter a decree validating the Section 17 right of way.

(Continued from previous page)

be shaky business to attribute significance to the inaction of Congress . . ." 367 U.S. at 409. *See also Bob Jones University,* 103 S.Ct. at 2033 (1983) ("Non-action by Congress is not often a useful guide"); *Kent v. Dulles,* 347 U.S. 117 (1938). (Congress' failure to repudiate "scattered rulings" does not amount to acquiescence).

Nothing in the record suggests that Congress at any time knew of the questionable use of Section 17. Moreover, the circumstances surrounding the enactment of the 1926 and 1928 Pueblo right-of-way Acts indicate to the contrary. The 1926 Act, c. 282, 44 Stat. 498, was hastily drafted a mere month before its passage. Kelly Report, pp. 32-33). When the bill went to the House floor for consideration on the Consent Calendar the matter of Section 17 conveyances never arose. 67 Cong. Rec. 8633-8634 (1926). Consideration of the bill was confused and perfunctory. Rep. Morrow, its sponsor, stated that the United States held title to Pueblo lands. *Id.* at 8633. Rep. Leavitt described Pueblo lands as set aside by executive order. *Ibid.* There was no debate in the Senate. *Id.* at 842. The 1928 Act, 25 U.S.C. § 322, was enacted after the 1926 Act was held void. Kelly Report, pp. 35-36. Its history discloses absolutely no reference to the practice of approving easements under Section 17. This record fails to establish any basis for a finding of congressional acquiesence in, or even awareness of, Interior's use of Section 17.

A. Res judicata does not bar litigation of the validity of the § 17 right-of-way because the issue could not have been adjudicated in United States v. Brown.

The validity of Mountain Bell's right-of-way could not have been adjudicated in *United States v. Brown* and therefore a challenge to its validity is not barred by the prior dismissal.[36] "A judgment is not conclusive on any question which, from the nature of the case or the form of the action, could not have been adjudicated in the case in which it was rendered." *Ash Sheep Co. v. United States,* 252 U.S. 159 (1920). Where the jurisdictional statute of the first action does not permit a particular claim, that claim is not barred by res judicata. *Lower Sioux Indian Community v. United States,* 626 F.2d 828 (Ct.Cl. 1980).[37]

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[36] Even if the validity of the Section 17 right-of-way could have been adjudicated, a suit for trespass damages arising after the decree is a different cause of action. *United States v. Brown* was a quiet title action to determine title under the provisions of the Pueblo Lands Act. Trespass is a continuing harm giving rise to a new cause of action with each discrete period of time. *Richardson v. City of Boston,* 60 U.S. 263 (1856); *Newman v. Hiltat Elkhorn Coal Co.,* 302 F.2d 723 (6th Cir. 1962). If the issue of title had been adjudicated, there would be a question of collateral estoppel, but res judicata is not applicable. *Richardson v. City of Boston,* 60 U.S. 263 (1856). *See Lawlor v. National Screen Service,* 349 U.S. 322 (1955). Additionally, under the Act, only suits in equity to quiet title were authorized. Prior to the merger of law and equity, claims in law could not be brought in an action in equity. *See, e.g., Ash Sheep Co. v. United States,* 252 U.S. 159 (1920). Thus, even a final judgment in an equity suit under the Act could not bar claims at law which could not have been brought in the first action. *Id., Bowless v. Capitol Parking Co.,* 143 F.2d 87 (10th Cir. 1944).

[37] *See also Creek Nation v. United States,* 168 Ct.Cl. 483 (1964). For purposes of determining the res judicata effect of a previous case brought by or on behalf of an Indian plaintiff, the prior jurisdictional statute is to be construed narrowly. *Lower Sioux Indian Community,* 626 F.2d at 83.

Suits pursuant to the Pueblo Lands Act were limited exclusively to adjudicating claims as set out in the Act. The statutory scheme is clear. The Board was to determine which of those persons who claimed title to Pueblo land met the requirements of Section 4, and the United States was to sue those who did not. Determinations of extinguishment of Pueblo title by the Board and the court were controlled by the requirements of Section 4(a) and (b). *United States v. Herrera,* No. 1720 Equity (D.N.M., May 24, 1928) (cited in *United States v. Wooten,* 40 F.2d 882 (10th Cir. 1930)); Kelly Ex. 21. Section 4 does not address post-Act conveyances or easements.[38] The government's authority to sue under the Act did not extend to easements arising after the Act.

Because the scope of the suit in *Brown* was limited by the Act and the laws of procedure at the time, the scope of its res judicata effect is similarly limited. *Rheinberger v. Security Life Ins. Co.,* 146 F.2d 680 (7th Cir. 1945) (where title was not properly an issue in a prior foreclosure suit, a city was not barred from raising its title in defense of a subsequent trespass action); *see, also, United Shoe Mach. Co. v. United States,* 258 U.S. 451 (1922). The validity of the Section 17 right-of-way was not a proper subject of the quiet title action in *Brown,* and

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[38] As is apparent in numerous sections the "claims" to be adjudicated under the Act were limited to claims in fee. Sections 2, 3 and 4 provide for means of extinguishing Pueblo title. Section 4 refers to those "claiming title to, or ownership". Section 5 gives a claimant a quitclaim decree. Section 13 provides that patents and fieldnotes extinguish all right, title, and interest. Section 15 deals with improvements made by persons claiming ownership. In the only case under the Act where the issue was reached, the district court held it did not have jurisdiction to adjudicate rights-of-way. *United States v. Abeyta,* No. 2135 Equity (D.N.M. June 25, 1931). See Kelly Report, pp. 36-37, and Ex. 97.

Mountain Bell's dismissal from *Brown* does not bar the present action.[39]

The district court had no power to adjudicate the validity of the Section 17 right-of-way. Its jurisdiction was limited to adjudicating claims of title in fee and it could only enter a decree in favor of those meeting the requirements of § 4(a) and (b). *United States v. Albeyta,* No. 2135 Equity (D.N.M. June 25, 1931). When a court lacks subject matter jurisdiction, the decree entered is void and without res judicata effect. *United States v. U.S. Fidelity & Guaranty,* 309 U.S. 506 (1940).[40]

B. The adjudication in Brown was not on the merits.

Mountain Bell has failed to meet its burden of showing that the dismissal in *Brown* was on the merits, and it is apparent that it was not. Although there is a presumption that a dismissal in equity without qualifying words is a final adjudication on the merits, the "presumption of finality . . . disappears whenever the record shows that the court did not pass upon the merits . . ." *Swift v. McPherson,* 232 U.S. 51, 55-56 (1914).

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[39] The mere fact that the Section 17 right-of-way was granted prior to the entry of the decree does not bar the litigation of its validity now where the prior suit was not intended to encompass the issue. *National Bank of Louisville v. Stone,* 174 U.S. 432 (1899); *Mellon v. Minneapolis St. P. & S.S.M. Ry Co.,* 11 F.2d 332 (D.C. Cir. 1926), *cert. denied,* 271 U.S. 678 (1926). This is so even if the court refers to the matter in its opinion. *East Tennessee Tel. Co. v. Board of Councilmen,* 190 F. 346 (C.C. Ky., 1911).

[40] Even if the dismissal were construed as a consent decree, it would be void. "The district court's authority to adopt a consent decree comes only from the statute which the decree is meant to enforce." *System Federation v. Wright,* 364 U.S. 642, (1961) (quoted in *Firefighters Local Union No. 1784 v. Stotts,* 104 S.Ct. 2576, 2587 n.9 (1984)).

There is no evidence the court considered the underlying claim against Mountain Bell in *Brown.* Given that Mountain Bell had not even answered, which would put the cause at issue (Eq. Rule 31) it is unlikely there could have been any adjudication on the merits. *Pueblo De Taos v. Archuleta,* 64 F.2d 807 (10th Cir. 1933). Particularly in the context of the Pueblo Lands Act, it cannot be assumed that the court would finally adjudicate the Pueblo's rights with no examination of the merits. *See United States v. Pueblo of Taos,* 515 F.2d 1404 (Ct.Cl. 1975).

The Act specifies in Section 5 that only a decree in favor of the claimant *after* a plea has been successfully maintained bars the United States or the Indians from asserting title in the future. The Order of Dismissal here (J.A. 36-37) was not a decree in Mountain Bell's favor. *Compare, e.g., United States v. Wooten,* 40 F.2d 882 (10th Cir. 1930). It simply allowed Mountain Bell to avoid the case, just as Mountain Bell was able to avoid nearly every other such case.[41] Since it was not a decree under Section 5, it was not intended to have preclusive effect, and clearly was not a final adjudication on the merits for purposes of res judicata.

Because of the limited scope of suits under the Act, the Section 17 right-of-way merely mooted the complaint as to Mountain Bell. *Cf.* Kelly Ex. 39, p. 4. A dismissal for mootness is not an adjudication on the merits and has no res judicata effect. *DeVolld v. Bailar,* 568 F.2d 1162 (5th Cir. 1978); *N.Sims Organ & Co. v. S.E.C.,* 293 F.2d 78 (2d Cir. 1961), *cert. denied,* 368 U.S. 968 (1962).

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[41] Mountain Bell was sued in only two other quiet title suits under the Act, and was dismissed from both. *United States v. Abeyta,* No. 1933 Equity (D.N.M. May 24, 1930); *United States v. Wooten,* 40 F.2d 882 (10th Cir. 1930).

The order of dismissal in *Brown* merely restates the government's motion. It was signed immediately upon its submission with the motion. (J.A. 36, 37, 63.) There is no evidence that the court considered Section 17 or the validity of the right-of-way, and that issue was clearly not contested.

"A decree is to be construed with reference to the issues it was meant to decide." *Vicksburg v. Henson,* 231 U.S. 259 (1913). The Court in *Vicksburg* stated:

> "Every decree in a suit in equity must be considered in connection with the pleadings, and if its language is broader than is required, it will be limited by construction so that its effect shall be such, and such only, as is needed for the purposes of the case that has been made and the issues that have been decided" . . . .
>
> . . . .
>
> The nature and extent of the former decree is not to be determined by seizing upon isolated parts of it or passages in the opinion considering the rights of the parties, but upon an examination of the issues made and intended to be submitted and what the decree was really designed to accomplish.

Id. at 269, 273 (quoting *Barnes v. Chicago, M. & St. Paul Ry. Co.,* 122 U.S. 1, 14 (1887). *Accord, Oklahoma v. Texas,* 272 U.S. 21 (1926) (prior decree reciting location of a boundary that was not directly in issue in the case did not bar litigation of the precise location of the boundary). Where a statute controls the issues in a case, recitals with respect to matters incidental or collateral to the direct issue presented by the statute are not conclusive in subsequent proceedings about the same subject matter. *Norton v. Larney,* 266 U.S. 511 (1925); *United Shoe Mach. Co. v. United States,* 258 U.S. 451 (1922). *See, North Carolina R.R. v. Story,* 268 U.S. 288 (1925); *Harriman v. Northern Security Co.,* 197 U.S. 244 (1905).

C. No consent decree was entered.

Mountain Bell attempts to portray the events in *Brown* as a settlement agreement between the parties and a consent decree entered thereon.[42] The facts surrounding the dismissal do not support this conclusion.

There was no negotiation between the government attorney and Mountain Bell regarding the suit, and Mountain Bell independently sought a new right-of-way. *After* it had been obtained, the government's attorney wrote the Company:

> I am informed, however, that you have obtained a right-of-way deed from the Indians of this Pueblo and that it will be presently forwarded to Washington for approval. Please let me know if I am right in this, and if so, please inform me as soon as the transaction becomes complete.

(J.A. 65.) Mountain Bell subsequently informed Fraser of its right-of-way (J.A. 66, 67), and he then moved to dismiss Mountain Bell from the suit. (J.A. 68, 36.) The correspondence demonstrates that the right-of-way was not acquired in settlement of the case. Rather, Mountain Bell independently obtained it and the government dismissed the case against Mountain Bell as moot. No settlement agreement was made and the dismissal was not a consent decree.

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[42] Both Petitioner and AT&SF cite the congressional hearings as supporting the notion that the *Brown* dismissal was a consent decree, Pet.Br. at 46, n.35.; AT&SF Br. at 24, but the cited passages concerned the Jones-Leatherwood bill and the desire to dispose of the large percentage of "easy" cases without expense to the claimants, many of whom were poor. The Jones-Leatherwood bill's discretionary approach was rejected in favor of the preliminary investigation by the Pueblo Lands Board. 64 Cong.Rec. 5326-27 (1924); Kelly Report, pp. 6-8.

Despite Mountain Bell's attempt to distinguish *National Life & Accident Insurance Co. v. Parkinson,* 136 F.2d 506 (10th Cir. 1943), that case holds in a very similar fact situation that no consent decree was entered. In *Parkinson,* the appellant argued that even if the board's order at issue was void, the dismissal of his appeal from that order was a consent decree and was binding.[43] The court found, however, that no consent judgment was entered. The court stated, "we do not think that the order of the District Court merely consenting to the withdrawal of the appeal, to permit the second order of the Board ... to become final and effective, rises to the dignity of a consent judgment or dismissal on the merits." *Id.* at 509.

There is even less support for a finding of a consent judgment in this case, because in *Parkinson* the dismissal and the tax reduction were a bargained-for exchange between the parties. The court concluded, "Courts do not validate that which is invalid by merely consenting to a dismissal of the controversy over which its jurisdiction has been invoked." *Id.* at 509.

Mountain Bell's reliance on *United States v. Parker,* 120 U.S. 89 (1887) is misplaced. The dismissal there was res judicata because the court had determined the merits of the controversy. *Id.* at 97. In *Jacobs v. Marks,* 182 U.S. 583 (1901), this Court distinguished the dismissal in *Parker* as an adjudication on the merits and not a decree entered merely upon settlement of the case. In fact, the

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[43] Contrary to Mountain Bell's assertion, *Parkinson* was not based on a lack of jurisdiction in the first court. Such a holding would have been contrary to the law. *Chicot County Drainage Dist. v. Baxter State Bank,* 308 U.S. 371 (1940). (*Compare United States v. U.S. Fidelity & Guaranty,* 309 U.S. 506 (1940).) The court in *Parkinson* held simply that there had been no consent decree in the first suit.

Court in *Parker* distinguished dismissals by one party upon the written consent of the other, saying such dismissals have no res judicata effect. *Parker,* 120 U.S. at 96. Even less res judicata effect can be attributed to the voluntary dismissal in *Brown* where Mountain Bell never appeared.

Further, in *Parker* the government sought in the second suit to recover the same debt it was seeking in the first suit. In contrast, the Pueblo is challenging the validity of a right-of-way that was not in issue in the first suit but rather was the cause of the dismissal. Such a challenge is not barred. *Texas & Ry Co. v. Southern Pacific Co.,* 137 U.S. 48 (1890) (collateral estoppel applied only to the matters of pre-existing differences, settled and compromised, and not to the validity of the contract that terminated the lawsuit, which was not in controversy or passed upon in the causes in which the decrees were rendered). *See also, Donald F. Duncan, Inc. v. Royal Tops Mfg. Co.,* 343 F.2d 655 (7th Cir. 1965) (consent decree inherited all the infirmities of the license upon which it was entered and afforded no legal basis for res judicata).

The decree in *Brown* must be viewed in the context of the limited nature of the suit, one to challenge pre-existing claims intended to be resolved by the Pueblo Lands Act. The validity of Mountain Bell's right-of-way was not relevant to its dismissal; its acquisition, valid or not, was all that was relevant in the limited nature of the suit brought. The recital in the order was not intended to establish the validity of the Section 17 right-of-way, and that perfunctory order is no bar to this action.

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CONCLUSION

The Pueblo Lands Act and this Court's three unanimous decisions addressing the status of the Pueblo Indian tribes, *United States v. Sandoval,* 231 U.S. 28 (1913), *United States v. Candelaria,* 271 U.S. 432 (1926), and *United States v. Chavez,* 290 U.S. 357 (1933), eliminated all doubt that the Pueblos were tribal Indians entitled to the same protective guardianship as other tribes. Section 17 served Congress' purpose of proclaiming that fact. Petitioner and assorted *amici* urge the Court's acquiescence in the perversion of this long-settled principle. The decisions below, recognizing the consistent treatment of the Pueblos by Congress and this Court, are well-founded and should be affirmed.

Respectfully submitted,

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January 7, 1985

APPENDIX A

UNITED STATES DEPARTMENT
OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
Albuquerque Area Office
P.O. Box 8327
Albuquerque, New Mexico 87198

320—Statute of Limitations

Dec 28 1984

Memorandum

TO: Solicitor
Attn: Michael Cox, Attorney-Advisor

FROM: Area Director

SUBJECT: Pueblo Rights-of-Way Granted Pursuant to Section 17 of Pueblo Lands Board Act of 1924

Pursuant to your request, the following information is provided concerning rights-of-way across Pueblo lands. The Pueblo agencies have calculated the total number of rights-of-way granted across tribal lands to be 779 (excluding the rights-of-way which were granted under Section 17 of the Pueblo Lands Act of 1924). The breakdown is as follows:

Southern Pueblos Agency	424
Laguna Agency	110
Northern Pueblos Agency	220
Zuni Agency	25
TOTAL	779

The total number of rights-of-way granted pursuant to Section 17 appears to be 79, according to computations

done in 1982. Most of them (59) are reported from the Southern Pueblos Agency which did include the Pueblo of Laguna in its' jurisdiction in 1982. Laguna now has its' own agency.

With reference to the rights-of-way of the three companies submitting briefs in the case *Pueblo of Santa Ana v. Mountain States Telephone and Telegraph Company,* Civil No. 84-262, the following information is provided. Mountain States Telephone and Telegraph Company (Mountain Bell) has acquired 26 rights-of-way from the Pueblos. All of the lines except for two have been abandoned or have been replaced by telephone cables under new rights-of-way agreements using authority other than Section 17. The two standing lines are at Santo Domingo and Taos Pueblos. The right-of-way at Santo Domingo was recently reapproved under other authority as part of a comprehensive agreement between Mountain Bell and that Pueblo. The Taos line is therefore the only existing telephone right-of-way for Mountain Bell under Section 17. Mountain Bell has acquired comprehensive agreements similar to that at Santo Domingo from most of the other Pueblos. These agreements also provide for settlement of trespass claims against Mountain Bell and dismissal by the United States Attorney's Office of the case *United States of America, on behalf of the Pueblos of Acoma, Isleta, Jemez, Laguna, Picuris, Pojoaque, San Felipe, San Ildefonso, San Juan, Sandia, Santa Clara, Santo Domingo, Taos, Tesuque, and Zia v. Mountain States Telephone and Telegraph Company, Inc., and Continental Telephone Company of the West,* Civil No. 82-1513-M.

The Atchison, Topeka and Santa Fe Railway Company has its main line right-of-way across seven of the Pueblos for

a distance of 114.74 miles according to agency computations. Of that mileage, 27.54 miles were approved pursuant to Section 17, as follows:

Acoma	6.64	miles under Section 17
Laguna	10.0	miles under Section 17
Isleta	8.43	miles under Section 17
Sandia	0.0	miles under Section 17
Santa Ana	2.07	miles under Section 17
San Felipe	0.40	miles under Section 17
Santo Domingo	0.0	miles under Section 17

Most of the Railway Company's agreements (19 total) under Section 17 appear to have been for stone and water, pipelines, station grounds, telephone lines, and arroyo reinforcement.

Public Service Company of New Mexico has seven rights-of-way approved under Section 17. Each of these was approved for a term of fifty years and all of them have expired and been re-negotiated under other authority except for the right-of-way at Isleta, which expires in 1986.

I hope this information will be of use to you. We have not been able to determine the exact number of rights-of-way granted under Section 17 that are still in use, but will develop that information. Two of the companies that acquired several rights-of-way under Section 17 were the Postal Telegraph-Cable Company and Western Union Telegraph Company. The former company has been defunct for years and Western Union has abandoned most of its lines, but we have not yet determined whether other companies acquired any of the rights of these two companies.

If you have any other questions, please call Ethel J. Abeita, Statute of Limitations Coordinator for the Albuquerque Area Office at (505) 766-3868/FTS 474-3868.

Sincerely,

/s/ Charles R. Tate
Acting Area Director

APPENDIX B

UNITED STATES DISTRICT COURT
District of New Mexico
SANTA FE, NEW MEXICO 87501

SANTIAGO E. CAMPOS
JUDGE

October 29, 1984

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RE: Pueblo of Isleta v. Watt, et al.; No. 82-1504 C

Pueblo of Sandia v. New Mexico State Highway Commission et al.; No. 82-1522 C

Pueblo of Isleta v. Public Service Company of New Mexico, et al.; No. 82-1535 C

Pueblo of Isleta v. Atchison, Topeka & Santa Fe Railway Co.; No. 82-1537 C

Pueblo of San Juan v. Mountain States Tel. & Tel. Co., et al.; No. 82-1547 C

Dear Counsel:

In 53 U.S.L.W. 3257 (10-9-84) it is reported that the United States Supreme Court has granted certiorari in *Pueblo of Santa Ana v. The Mountain States Telephone and Telegraph Co.*, — F. 2d —, No. 83-1220 (10th Cir. May 14, 1984); No. 80-841-M

Counsel of Record October 29, 1984

Page 2

RE: Cases 82-1504, 82-1522
82-1535, 82-1537, 82-1547

(D.N.M. June 2, 1982). The prior abatement of the cases listed above should, therefore, be continued.

An order has been filed to accomplish this. A copy applicable to your particular case is enclosed.

Unless, at this time, the mindset of the parties is all or nothing and if there is any thought of compromise prior to decision by the United States Supreme Court, I will offer for your consideration the possibility that the holding in *Ohio Oil Co. v. Sharp*, 135 F.2d 303 (10th Cir. 1943) may be applicable in this case, i.e.:

> It is well settled that one who invades or trespasses upon the property rights of another, while acting in the good faith and honest belief that he had the lawful and legal right to do so, is regarded as an innocent trespasser and liable only for the actual damages sustained.

Ohio Oil Co., supra, at 308.

And then there is the further possibility that if above is applicable in this case, that what was originally paid for the right of way easements in question may be an accurate measure of "actual damages sustained," such that

damages for past trespasses, if trespasses there be, would result in a wash.

Judge Robert W. McCoy has been conducting settlement conferences in some of my cases. Do you feel it worthwhile meeting with Judge McCoy for exploration of settlement possibilities?

Sincerely,

/s/ SANTIAGO E. CAMPOS
UNITED STATES DISTRICT JUDGE

Encl.
cc: The Hon. Edwin L. Mechem
The Hon. Robert W. McCoy

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

Civil Action No. 80 841 M

PUEBLO OF SANTA ANA

Plaintiff,

v.

MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY

Defendant.

DEFENDANT'S RESPONSE TO PLAINTIFF'S SECOND REQUEST FOR ADMISSIONS

Pursuant to Rule 36 of the Federal Rules of Civil Procedure, the Defendant The Mountain States Telephone and Telegraph Company (hereinafter called "Mountain Bell") responds to the Plaintiff's Second Request for Admissions as follows:

REQUEST FOR ADMISSION NO. 1:

Mountain Bell knows of no documents within its possession, control, or knowledge indicating that it or its predecessor in interest obtained from Santa Ana Pueblo or the Department of the Interior in the period 1900-1926 a right-of-way or easement for a telephone line across Santa Ana Pueblo land.

RESPONSE TO REQUEST NO. 1:

Although Mountain Bell's searches to date have not produced any document to establish conclusively that it or a predecessor in interest obtained a right-of-way across

Santa Ana lands from the Santa Ana Pueblo or the Department of the Interior in the period 1900-1926, there are indications in the Statement of Property Owners and in the files produced by Mountain Bell to Plaintiff in response to Plaintiff's discovery that Mountain Bell may have obtained such a right-of-way during the period in question.

. . .

APPENDIX D

EL PASO, Texas,
January 16th, 1928.

Mr. N. O. Pierce,
General Plant Manager,

Dear Sir:

Transmission of Tracings covering El Ranchito Grant (sometimes known as Santa Ana—El Ranchita Indian Purchase).

I am forwarding under separate cover, two tracings covering Denver—El Paso Toll Line through the El Ranchito Grant, this grant is sometimes known as the Santa Ana—El Ranchito Indian Purchase.

Also four copies of field notes covering this grant.

Yours truly,

J.A. KELLY,
Plant Superintendent.

P.S. This is the Grant that we did not know belonged to Indians as it is located several miles from the Santa Ana Pueblo, but is the Grant referred to in a recent summons sent us.

APPENDIX E

Excerpts from Hearings on H.R. 13452 and H.R. 13674 before the House of Representatives Committee on Indian Affairs, 67th Cong. 4th Sess. (1923)

House Hearings Page 17-18—Mr. Wilson: "1910. In that act there was a specific provision in the compact requiring the State of New Mexico to give up and surrender, if it had any, to the Congress of the United States all jurisdiction and right over the lands of any Indians deriving title from the United States of America or from any prior sovereignty, and reserving jurisdiction of Congress over those lands until the title of the Indian had become extinguished and ceased to exist. That is not exactly the wording, but in effect the wording."

Again, in a further provision it said that lands of the Pueblo Indians of New Mexico should be considered Indian country within the meaning and intent of the laws of the United States on that subject, and making it a crime to introduce liquor into Indian country."

Mr. Collins: "Is that part of the same act of 1910?"

Mr. Wilson: "Part of the enabling act. The constitution of the State accepted those provisions, which became law, thereby Congress practically taking from within the exterior boundaries of the State of New Mexico those tracts of land, and stating that Congress alone should legislate concerning them. There you will see the reasons why we come to Congress for legislation, but that is not all. The constitutionality of that provision, the right of Congress to impose such a condition on New Mexico, came up in what is known as the Sandoval case in 1912 . . . . That

case was appealed by me to the Supreme Court of the United States, and then handled by the Department of Justice. It was reversed by the Supreme Court of the United States, which held that Congress had a general right to impose such a condition because it had the constitutional right to legislate concerning a dependent people, and that the Pueblo Indians were such a dependent people within the meaning of the constitutional power of Congress to legislate."

Mr. Leatherwood: "Is it not true that the Sandoval case was decided on the theory of the guardianship of person and not of property?"

Mr. Wilson: "Yes, sir; but, Mr. Leatherwood, a point about that is this, that there has been actually no real definition of the extent which the supreme court meant to go in the Sandoval case. It is rather an interesting thing that nothing has yet come up whereby the extent of the holding there has actually come out. The point, however, is this, that for the first time the highest court of the land has held, did hold, that these people were wards and the Government of the United States owed the same duty toward them and their care and protection that it owed toward any other Indians hitherto classified as dependent people and subject to such legislation. Immediately the question arose in New Mexico, whether all these titles which were acquired since 1848 under the status which I have endeavored to briefly describe to you as existing prior to the enabling act or prior to the Sandoval case, could not be defeated by the United States of America, because most of them had become good through the New Mexico statutes of adverse possession."

House Hearings Page 21—Mr. Wilson: "The reason they were was, as I have tried to explain, that the Sandoval case reversed what we might call a rule of property which had been created by preceding decisions as regards their right to acquire title to those lands. When the Sandoval case was decided it was decided that those Indians were a dependent people, wards of the Government, and that Congress can legislate about them and should be their protection."

House Hearings Page 22-23—The Chairman: "Are we going to get anywhere if we get legislation to clear the situation down there, clear up the titles?"

Mr. Wilson: "You can, because the atmosphere there was cleared by the Sandoval decision, which was not the case when I was attorney. Then we did not know the effect of it."

Mr. Sears: "My colleague, Mr. Hayden, has just left. I wanted to ask a question while he was here. He stated that where a bona fide settler comes into court he is entitled to certain rights. As I understand the Indian matters, having been on this committee for eight years, the Indian is the ward of the Government and like a minor who has to go into court through a guardian he is helpless. Therefore, knowing he is helpless, when I go and squat on his land, what right have I if I lived there 50 years?"

Mr. Wilson: "Not at all."

House Hearing Page 26—Mr. Sears: "They are in honor bound to. It is in the statute, and the guardian can not waive the limitation. The Indian is helpless; the Government in good faith can not waive any right that the Indian

has. You can go into court and if you do not go into court you are estopped, but your guardian can not supinely sit and refuse to go into court and let you lose your rights, the Government can not do it."

Mr. Wilson: "The Government has got to do it or be subject to criticism."

Mr. Sears: "Are they doing that now?"

Mr. Wilson: "Colonel Twitchell means to do his duty, and if he thinks he has a good right, that they can not raise the statute of limitations against the Government. If he does that it will put most of them off."

Mr. Gensman: "That being the case, do you not feel certain that eventually those suits will be brought in a court of competent jurisdiction before a judge that you say is one of the best in the country?"

Mr. Wilson: "What we are afraid of is that the technicality which the Government as the guardian of these Indians is bound to interpose will result in a thing that the Indians do not want and the Government does not want, destruction of the rights of the settlers, some of them bona fide, but the Government is bound to do it since it can not be otherwise."

Mr. Gensman: "Some will win that ought not to win and some will lose that ought not to lose?"

Mr. Gensman: "They will all lose regardless of right or wrong?"

Mr. Wilson: "Yes, sir."

House Hearings Page 40—Mr. Wilson: "The Sandoval case, yes; it was important because it was then determined

the Indians were wards of the Government in that decision."

The Chairman: "They did not take up any question of title."

Mr. Wilson: "No."

Mr. Roach: "That makes it a judicial determination. I had not read this, but it may have been like a lot of similar cases, where the judge in writing an option runs far afield among subjects which is not deciding."

Mr. Gensman: "And didn't know what he was talking about."

Mr. Wilson: "The point about that is this, that always prior to that time these Indians had been considered free agents who could buy and sell the same as anybody else. That case decided that they were not free agents but were wards, and that condition had existed since 1848 as far as this Government was concerned."

Mr. Gensman: "And determined that in a whisky case."

Mr. Wilson: "Yes, they had to determine that question and the consequences as I have stated them followed, and every lawyer here will tell you that is a fact."

House Hearings Page 42-43—Mr. Burtness: "The decision of the United States Supreme Court did not change in any shape, manner, or form the respective rights of the parties, but simply laid down under the law saying what it had been. It was simply an adjudication. While I do think that statehood might have changed to some extent the situation of these parties, under the enabling act and

the acceptance thereof the courts of New Mexico, the people of New Mexico, relinquished jurisdiction over these Indians expressly to the United States. The decision of the Supreme Court changes no rights in any shape, manner, or form: simply adjudicated them."

Mr. Leatherwood: "The status of the Indians?"

Mr. Wilson: "Absolutely went back to 1848."

Mr. Leatherwood: "Based upon what the Indians had been all that time it laid down the law."

Mr. Wilson: "The enabling law was only a link from 1848 down to the date of the decision."

House Hearings Page 63—Mr. Wilson: "I do not think it is fair to take the State statute and Territorial statute as the basis of title against those Indians because they were not in the position of the ordinary citizen to protect themselves and could not and did not protect themselves. To make any comparison between the status of the Pueblo Indians in their rights under our State and Territorial adverse statutes with the status of the ordinary citizen is impossible without doing a grave injustice to the Indians. That is the actual fact."

Mr. Weaver: "Since the enabling act when Congress took jurisdiction of these matters, then, of course, any suit would have had to be brought by the United States Government."

Mr. Wilson: "As a matter of fact, the full realization of the effect of the enabling act did not dawn upon anyone for a while. When the Sandoval case came up it was flatly before the courts and when that decision was

rendered by the Supreme Court of the United States we began to see how far-reaching it was. We were so thoroughly saturated with the conception of the law prior to that time that it took time to get the idea out of our heads that there was a different status and that different status had really always existed, as the opinion in the Sandoval case decided."

House Hearings Page 72-73—The Chairman: "Where has the Government of the United States failed in its effort to protect the Indians since the State of New Mexico became a State?"

Mr. Wilson: "Because from 1848 to the present time people have gone on this land on the assumption that they can acquire right under the territorial and State statute by adverse possession, that purchase from the individual Indian gave a right under the statute of limitations. The Indians have not been able to protect themselves in the same manner as the average citizen of New Mexico would be able to do because of their dependent condition. Now, it was the duty of Congress to see that their rights were protected or that these territorial statutes did not apply to them, which could have been readily done because during territorial days Congress had plainly power to legislate concerning the Territory of New Mexico. When the enabling act was passed it did in effect undertake a piece of legislation which would make it possible for Congress to do that which it should have done."

Mr. Roach: "Has there been any dereliction since the enabling act or delay on the part of the Government since the enabling act?"

Mr. Wilson: "We think so because we think this legislation should have been initiated sooner by the Government. The things have gone on since that time."

Mr. Burtness: "No title is conveyed by those encroachments if they have been made. What I am trying to get at is that even if there has not been legislation since the enabling act, in the enabling act the jurisdiction over these lands was expressly held in the United States Government, and in the interim in which these surveys were made the United States court has been the only court which had any jurisdiction over title to this Indian land. Even if there has been encroachments made those matters can still yet be accounted for. The Government or the Indian is not losing anything so far as losing it is concerned. The mere fact that somebody extended his fences and took 500 acres that did not belong to him is not final. The Government can take that away from him now and will do it under the provisions of this bill, will it not?"

Mr. Wilson: "Yes; if it has proof of no conflict or whether he had the right to extend his fence, and possession of it, etc. That is going into the question of what is going to happen in court."

Mr. Roach: Whether the Indian has really lost anything so far as losing it is concerned by reason of the failure of the Government to enact legislation of this character or some other character?"

Mr. Wilson: "No."

Mr. Roach: "Not since the adoption of the enabling act has the Indian actually lost anything."

Mr. Wilson: "No; only rights to recover."

Mr. Roach: "His rights should not be affected because the Government reserves those rights in the enabling act, reserves exclusive jurisdiction and control."

Mr. Wilson: "The rights; yes."

Mr. Roach: "How can the Government or its officers be criticized for taking something away from the Indian by reason of failure to enact particular legislation that you think should have been acted?"

Mr. Wilson: "As time goes by and more time goes by we lose the equities of the Indians."

Mr. Roach: "I agree with you it may have been proper to legislate, but I do not agree with you that the Government is subject to criticism by failure of particular legislation which it should have enacted. What has the Indian lost?"

Mr. Wilson: "I think he has lost water constantly by misappropriation constantly going on all the time of the Indian water by settlers who are putting it on their land or increasing the use of the water. They are taking it from the Indian all the time.

Mr. Roach: "Let us see whether he has or not. Here is one of the pueblos which has water on its land. Title to that land and jurisdiction of the title to that land by the enabling act was put in the Government of the United States."

House Hearings Page 145—Mr. Burtness: "Do I understand, then, that the Supreme Court of the United States had laid down a different rule, in so far as their property is concerned, from the Sandoval case, which, as I under-

stand it, covered the situation as far as their persons were concerned?

Colonel Twitchell: "In its conclusions, and in every possible way in which a man can arrive at a conclusion, the opinions of the Supreme Court of the United States, in United States v. Joseph and United States v. Sandoval, are radically opposed to each other. The case of United States v. Sandoval practically reversed the case of the United States v. Joseph."

House Hearings Page 213-214 — Mr. Roach: "You talk about titles being tried in the J. P. courts. Do you not appreciate the fact that in the enabling act following New Mexico's statehood, that the reservation was contained in the enabling act placing jurisdiction and control of land titles of the Indians down there in the Government itself?"

Mr. Collier: "Yes, sir.

Mr. Roach: "What is there that could be done since that that could in any way affect those titles, keeping in mind that the statute of limitations does not run against the Government. Those encroachments that you spoke of, I have no doubt that they exist; I have no doubt that fences have been extended there beyond the Indian lands improperly, but that, permit me to remind you, does not lose the Indian his title, or it does not in any way affect the right of the Government to go in there and eject the trespassers."

Mr. Collier: "But they lose the use of the land."

Mr. Roach: Therefore the Indian title has never been affected."

Mr. Collier: "Has not been; but if the Bursum bill passes, we maintain it would be."

Mr. Roach: "In answer the question of Mr. Leatherwood this morning, asking you to state an instance whereby by any direct overt act they had lost land you stated the encroachments that occurred in extending their fences as an instance where the Indians had been robbed of their lands."

Mr. Collier: "Yes."

Mr. Roach: "It is apparent to my mind that they may have lost temporary possession but they have not lost a single foot of land or any title to land in those acts to which you have called attention."

House Hearings Page 286—Mr. Renshan: "There is a serious question as to whether or not all of these titles are fundamentally good, the cloud being created by the decision of the Supreme Court of the United States in the Felipe Sandoval case. Prior to that time there was no doubt in the minds of lawyers or layman that the persons living upon these grants had a good and valid title, but a cloud has now been created by uprooting the decision found in the Antonio Joseph case and the creation of the doctrine of tutelage, and attempting to throw that doctrine back so that it operates over two centuries and a half and not merely 1910, 1912, or 1913, the time when the decision was rendered. Thus we find ourselves in this turmoil and in this trouble; thus it happens that four suits have been brought in the United States District Court for the ousting of the occupants of tracts of land numbering about 600, affecting people to the number of about 1,200 men, women, and children. There are only 4 grants involved in those suits and there are some 16 other grants yet to be brought under the same form of attack. Thus you can see our trouble. The Attorney General has gone into the Federal court, and I have the allegations and prayer of the complaints herein;

in substance it is that these people have no right, title, or interest in the lands they occupy; that while it is true they have deeds, that those deeds were not recognized or were not made with the authority of the Spanish or Mexican Government or of the United States Government; that these people should bring their deeds into court to be canceled, and that they shall be ousted from the possession of the lands which they and their ancestors have, in many instances, occupied for more than 300 years. There is the practical condition with which we are faced."

Mr. Sears: "Without exupressing any opinion but trying to get at the facts, these cases are now in the courts, and as a representative of the Government and as a lawyer do you not think that the courts should be permitted to decide them and that Congress should not pass a law settling those cases before the courts decide them?"

Mr. Renehan: "I might say that if the settler could urge the plea of the statute of limitations against the Government—"

Mr. Sears: (Interposing). "Of course, that can not be urged against a ward, a minor, or an imbecile."

House Hearings Page 309—Mr. Burtness: "At any rate, the title was that, if Mr. Wilson and Colonel Twitchell are correct in their construction of the law, the chances are that he would be evicted under this various remedial legislation."

House Hearings Page 314—Mr. Roach: "Yes; they were; but when Congress reserved title or jurisdiction over title to all the lands within those grants it was then the particular duty of the Government of the United States to see that the interest and title of the Indians within those grants

were protected, because they assumed guardianship voluntarily, the Government on its own part. You have established in a way, or sought to establish, that the Indian was a free agent and a citizen and had a right to act, but here comes the Government of the United States along and says that he is not, but that he shall be my ward, and makes him its ward. I have got my own notion about this."

Mr. Renehan: "No; Congress, as I have said—"

Mr. Roach: (Interposing). "It seems to me that the Government had responsibility to these Indians. Whether they were citizens or not is another question. The Government has decided that they were not, but that they would be wards of the Government so far as land and title to land is concerned. It is up to the Government to make good on its guardianship."

House Hearings Page 345-346—Mr. Wilson: "As regards Mr. Renehan's argument concerning the law prior to 1910, I want to express to the committee very clearly, if I can, our position as to that. We contend that the Sandoval case settles the law so absolutely that there is no use of arguing what the law should have been or might have been if the Sandoval decision had not been rendered. That the matter decided in that case is this: That the Pueblo Indians of New Mexico since 1848 have been wards of the United States of America. And as a conclusion from that result arrived at by that court, we contend that since 1848 that Government of the United States is in the position of owing to these Indians reparation for anything which they may have lost through the neglect or failure of the United States to perform that duty."

House Hearings Page 347—Mr. Wilson: "The military occupation was 1846, but the treaty of Guadalupe Hidalgo

was not signed until 1848, whereby New Mexico became permanently a part of the United States. The date was February 10, 1848, and from that time on it is our contention that the confirmatory acts of Congress did give to those Indians every acre of land which was not at that time by the treaty of Guadalupe Hidalgo taken away from them under the Spanish or Mexican dominion or sovereignty."

Mr. Roach: "The Government, in other words, either of its own voluntary act or through act of Congress took charge of that situation generally from 1848 down to the present time."

Mr. Wilson: "Yes, sir; and the Sandoval case, regardless of Mr. Renehan's contention, so held."

With that brief statement in that connection, which I have tried to clarify because I do not think I did make it clear in going over my own record prior to this time.

Now, Mr. Chairman, I do not think that the general statements made by Mr. Renehan with reference to the law are important to rebut, because the Sandoval case settles the law until the Supreme Court of the United States reverses itself there; and regardless of any opinion as regards that particular decision, that remains the law and will remain the law."

House Hearings Page 371—Mr. Meritt: "I also wish to place in the record the decision of the United States Supreme Court in the Sandoval case. That has not yet been incorporated in the record, but referred to in the record a number of times. It is reported in 231 U.S. 28.

In connection with this decision I want to say that the Indian Bureau is responsible for the provisions going into

the New Mexico enabling act regarding the Pueblo Indians. We insisted that these provisions should go in for their protection. As a result of that legislation we have the decision of the Supreme Court in the Sandoval case, which, I believe, will result in good to these Indians. My interpretation of the situation is that it is absolutely impossible for any pueblo or any Pueblo Indians to lose any of his land since the New Mexico enabling act."

Mr. Roach: "That is, to lose the legal title."

Mr. Meritt: "To lose the title since the New Mexico enabling act, and credit for that legislation is due to the activities of the Indian Bureau. The decision in the Sandoval case (231 U.S. 28) referred to is as follows:" [Recites *Sandoval* decision].

House Hearings Page 408—Albert B. Fall: "I desire to say, unequivocally, that I most heartily indorse the statement in the first paragraph of these resolutions, to the effect that the duty rests upon the Government of the Republic to take the measures necessary to preserve the homes and the land holdings of the Pueblo Indians. I further indorse the statement that these Indians are wards of the Republic. (The Supreme Court in the Sandoval case has so held.)"

APPENDIX F

Excerpts from Hearings Before a Subcommittee of the Committee on Public Lands and Surveys, United States Senate, 67th Congress, 4th Session on S.3855 and S.4223, Bills Relative to the Pueblo Indian Lands (1923): ("1923 Senate Hearings")

Senate Hearings Page 57—Colonel Twitchell: "In the Joseph case it was accepted by the bar of New Mexico, and elsewhere throughout the United States having jurisdiction of these matters it was accepted, that the Pueblo Indians had a right to alienate their lands in a proper manner; and that contention and belief continued down to the time that New Mexico was admitted into the sisterhood of States; at which time, owing to the compact entered into between the people of New Mexico and the Government of the United States, the people of New Mexico surrendered all jurisdiction over these Pueblo Indians, their real property, and the areas held and occupied by the Pueblo Indians became and were denominated "Indian Country"."

Senate Hearings Page 58—Colonel Twitchell: ". . . after a careful consideration of the entire subject matter, the Supreme Court of the United States delivered its opinion in which it announced the principle that since the compact entered into between the people of New Mexico and the people of the United States, not only had that jurisdiction been surrenderd, but it declared in terms that at the time of the Treaty of Guadalupe Hidalgo these Pueblo Indians were in a state of tutelage, and came under the guardianship of the people and Government of the United States in that capacity; that they were a dependent people within the meaning of the law and the term, and it was the sov-

ereign duty of the United States, as a government, to protect them in all their rights regardless of any propositions which might be put up to the contrary, and practically, in terms overruling the Joseph case."

Senator Lenroot: "Do they attempt to distinguish, or do they discuss the Joseph case.?"

Colonel Twitchell: "They do. The opinion in United States v. Sandoval is a very lengthy opinion. It is in 231 U.S."

Senator Lenroot: "I think that decision had better go in the record."

Senator Bursum: "There was no question before the court affecting land titles?"

Colonel Twitchell: "No; not under that decision. But the Senator is raising at this time, by inference, the real question here, and that is whether or not under the principle announced in the Sandoval case the position of the Indian would be held to be the same as for offenses arising under the laws in regard to the introduction of liquor into Indian country. I will meet that, if I possibly can, Senator, in the argument.

After the decision in the Sandoval case all of these matters were considered by the Department of the Interior, the Bureau of Indian Affairs, and the Department of Justice, and a number of suits were filed in the United States Court for the District of New Mexico, seeking to evict and oust individuals holding tracts of land within the exterior areas of some of these Pueblo Indian grants."

Senate Hearings Page 73—Senator Lenroot: "I quite understood, Mr. Commissioner, the point that the depart-

ment was giving them greater consideration and latitude; but my point was whether the department was making any disclaimer with reference to protecting their rights, and alienation of property, or things of that sort?"

Commissioner Burke: "Not at all, Mr. Chairman, we are going to the same extent."

Senator Lenroot: "I supposed so."

Senate Hearings Page 74— Senator Bursum: "Is is not true that one of the reasons for placing the jurisdiction in the United States court is that under the enabling act Congress is vested with the control of these lands?"

Colonel Twitchell: "Yes; under the enabling act and under the compact as between the people of New Mexico and the Government of the United States we relinquished all jurisdiction in all of their lands as Indian country."

Senate Hearings Page 88—Colonel Twitchell: "So far as that is concerned, I have this to say, that in the matter of land alienation, so far as the Pueblos are concerned, I am strictly opposed to any power being granted to anybody for an alienation of their lands, and if in any way in any section of this bill, outside of the solution of the adverse holdings, so provides, I do not favor any act which will enable any of these communities in the future at any time, until they are placed upon the basis the same as any other American citizens, being permitted to alienate their lands."

Senate Hearings Page 113—Mr. Walker: "I think an Indian, even with a great deal of education shows some inability to grasp, in the sense that we think we have the ability to grasp, senses of values, the value of time, the

meaning of money and securities, and so forth; and sometimes, under exceptional circumstances, he is even a little bit uncertain on a close question of meum and tuum. I should not regard the Indians as ready to be entrusted with full citizenship, nor do I think it is safe to leave them open to sue and to be sued in the courts on land questions. I think it would be a bit confusing, because they have not the historical background and long acquaintance with the use of money, and the business knowledge necessary to give them that knowledge. But they have one thing that is found but rarely throughout the word, and that is a genius for form, for design, for pattern, and for various crafts, of basket making, pottery, and worship. They have this instinctive traditional sense of self-government handed down to them for ages, and they are a choice, a precious and unusual thing that should be preserved in this country under as serene conditions as possibly could be granted to them."

Senate Hearings Pages 219-220—Mr. Renehan: "I have never been in favor of a 10-year possession. I have always been in favor of a 20-year possession, although I believe I can defend a 10-year possession on the theory that I have endeavored to submit that the Government of the United States has been the deceiver, through its Congress and its courts, by representing in effect, by enactments and judicial decrees, to the people of New Mexico, until the theory was changed by the Sandoval decision, that the Indians had the right to transfer their lands, and that they had therefore the liability of losing their lands by adverse possession."

"It must be remembered that there had been no precise legislation by Congress prior to the enabling act of 1910

whereby they attempt to create in themselves a guardianship over the Indians; but they dealt with the Indians, so far as legislation is concerned, as if they were citizens with full power; so that if our people are to suffer then they suffer by reason of the error and misguidance of the courts of the United States."

Senate Hearings Page 246—Statement of Mr. Francis C. Wilson: "Mr. Renehan discussed at great length the law as he thought it should be. Our answer to that is that the Sandoval case settles the law, and that it is a waste of time to discuss legal questions which were involved in that case and which were settled by that case.

The statement that there was no precise legislation concerning these Indians prior to the enabling act is, we think, an erroneous one. When the Supreme Court of the State of New Mexico decided, in the case cited by Mr. Renehan, that the lands of these Indians were subject to taxation, in a test case, that case not appealed to the Supreme Court of the United States, unfortunately; but Congress responded by tacking a rider onto the Indian appropriation act for the succeeding year exempting them from taxation, past, present, and future. I submit, Mr. Chairman, that that was a specific act of Congress whereby Congress announced its attitude of protection and of fostering care over these Indians They could not pay taxes on their lands and on their property. All their property would have been sold for taxes if it had been made subject to taxation.

Not only that, but the Sandoval case recites a long series of a course of conduct, also legislation, whereby these Indians had received to an extent the same benefits

extended by Congress to other Indians—schools, for instance; the irrigation engineer at Albuquerque, who has charge of that district—there are several States, I think, in the district—etc.

Senate Hearings Page 282—March 25, 1920 Letter to Attorney General from S. Burkhart: "It seems to me that any suit brought by the Government, if necessary, should be based solely on the lack of authority of the Indians to convey. The Sandoval case in 231 U.S. settles this question beyond controversy in favor of the Government's contention."

APPENDIX G

Evolution of Section 16 of the Pueblo Lands Act

1. *The Bursum Bill*

67th Congress
2nd Session

S. 3855

IN THE HOUSE OF REPRESENTATIVES

September 13, 1922
Referred to the Committee on Indian Affairs

AN ACT

To ascertain and settle land claims of persons not Indian within Pueblo Indian land, land grants, and reservations in the State of New Mexico.

• • •

Sec. 16. That in cases where lands within such grants, or any part or parcel thereof, shall at the trial be shown not to have been held and occupied by the claimants, non-Indian, for the period fixed by section 8 of this Act for the acquiring of title under the provisions hereof, but have been purchased, or acquired by inheritance, used and cultivated, or purchased, or acquired by inheritance, held, occupied, or otherwise used for pastoral purposes under fence, in good faith by the claimant, the court shall make a special finding determining the boundaries of the tract so purchased, acquired, held and occupied, used and cultivated, in good faith, as well as also the value of the land without improvement, and shall report such finding to the Secretary of the Interior, and the claimant, if the Secretary of the Interior shall approve an application made by

the claimant for said land, may purchase the same at the value found by the court, and the purchase price shall be held in trust and expended for the pueblo under such rules and regulations as shall be from time to time prescribed for the benefit of the pueblo within whose grant any such tract of land shall be situated.

2. *The Lenroot Substitute*

67th Congress
4th Session

Calendar No. 1161

S. 3855

[Report No. 1175]

IN THE SENATE OF THE UNITED STATES

April 20 (calendar day, July 20), 1922.

Mr. BURSUM introduced the following bill; which was read twice and referred to the Committee on Public Lands and Surveys.

September 11, 1922

Reported by Mr. BURSUM, without amendment, considered by unanimous consent, read the third time, and passed.

September 13, 1922

Referred to House Committee on Indian Affairs.

November 27, 1922

Returned to Senate and referred to the Committee on Public Lands and Surveys

February 24, 1923

Reported by Mr. LENROOT, with amendments

[Strike out all after the enacting clause and insert the part printed in italic.]

A BILL

To ascertain and settle land claims of persons not Indian within Pueblo Indian land, land grants, and reservations in the State of New Mexico.

• • •

Section 13. That if any land adjudged against any claimant be situate among lands adjudicated or otherwise determined in favor of non-Indian claimants and apart from the main body of the Indian land, and the Secretary of the Interior deems it to be in the best interest of the Indians that such parcels so adjudged against the non-Indian claimant be sold, he may with the consent of the governing authorities of the pueblo, order the sale thereof, under such regulations as he may make, to the highest bidder for cash, and if the buyer thereof be other than the losing claimant, the purchase price shall be used in paying to such losing claimant the adjudicated value of the improvements aforesaid, if found under the provisions of section 12 hereof, and the balance thereof, if any, shall be paid over to the proper officer, or officers, of the Indian community, but if the buyer be the losing claimant, and the value of his improvements has been adjudicated as aforesaid, such buyer shall be entitled to have credit upon his bid for the value of such improvements so adjudicated.

3. *The Pueblo Lands Act*

68th Congress
1st Session

Calendar No. 522

S. 2932
[Report No. 492]

IN THE SENATE OF THE UNITED STATES

March 24 (calendar day, March 25), 1924

Mr. BURSUM introduced the following bill; which was read twice and referred to the Committee on Public Lands and Surveys

April 24 (calendar day, May 3), 1924

Reported by Mr. ADAMS, with amendments

[Omit the part struck and insert the part printed in italic]

A BILL

To quiet the title to lands within Pueblo Indian land grants, and for other purposes.

• • •

Section 16. That if any land adjudged by the court or said lands board against any claimant be situate among lands adjudicated or otherwise determined in favor of non-Indian claimants and apart from the main body of the Indian land, and the Secretary of the Interior deems it to be for the best interest of the Indians that such parcels so adjudged against the non-Indian claimant be sold, he may, with the consent of the governing authorities of the pueblo, order the sale thereof, under such regulations as he may make, to the highest bidder for cash, and if the buyer thereof be other than the losing claimant, the purchase price shall be used in paying to such losing claimant the adjudicated value of the improvements aforesaid, if found under the provisions of section 15 hereof, and the balance thereof, if any, shall be paid over to the proper officer, or officers, of the Indian community, but if the buyer be the

losing claimant, and the value of his improvements has been adjudicated as aforesaid, such buyer shall be entitled to have credit upon his bid for the value of such improvements so adjudicated.

4. The Act of May 31, 1933, ch. 45 § 7, 48 Stat. 108

Sec. 7. Section 16 of the Act approved June 7, 1924, is hereby amended to read as follows:

"Sec. 16. That if the Secretary of the Interior deems it to be for the best interest of the Indians that any land adjudged by the court or said Lands Board against any claimant be sold, he may, with the consent of the governing authorities of the pueblo, order the sale thereof, under such regulations as he may make, to the highest bidder for cash; and if the buyer thereof be other than the losing claimant, the purchase price shall be used in paying to such losing claimant the adjudicated value of the improvements aforesaid, if found under the provisions of section 15 hereof, and the balance thereof, if any, shall be paid over to the proper officer, or officers, of the Indian community, but if the buyer be the losing claimant, and the value of his improvements has been adjudicated as aforesaid, such buyer shall be entitled to have credit upon his bid for the value of such improvements so adjudicated."

APPENDIX H

Excerpts From Committee Reports on the different versions of Section 16. (Note—there were no committee reports commenting on Section 16 of the Bursum Bill).

1. The Lenroot Substitute. S. Rep. No. 1175, 67th Cong., 4th Sess. 5 (February 24, 1923):

> Under section 13 it is provided that in certain cases lands found to belong to the Indians, but away from the main body of Indian land, may be sold with the consent of the governing authorities of the pueblo involved.

2. The Final Bill. S. Rep. No. 492, 68th Cong., 1st Sess. 10-11 (April 24, 1924):

> If any land adjudged by the court or board against any claimant is situate among land adjudicated in favor of non-Indian claimants, apart from the main body of the Indian land, and the Secretary of the Interior deems it to be for the best interests of the Indians that such land be sold, he may with the consent of the governing authorities of the pueblo sell the same to the highest bidder for cash, and, if the buyer be other than the losing claimant, the purchase price shall be used to pay to such losing claimant the adjudicated value of the improvement thereon and the balance to be paid over to the proper officers of the Indian community. If the buyer be the losing claimant, the buyer shall be entitled to have credit upon his bid for the value of his improvements.

3. The Act of May 31, 1933, ch. 45, § 7, 48 Stat. 108; S. Rep. No. 73, 73rd Cong., 1st Sess. 4 (May 15 1933):

> The bill amends Section 16 of the act approved June 7, 1924, by removing certain restric-

tions in the sale of lands adjudged to belong to the pueblos. As thus amended, the Secretary of the Interior is authorized to make sales, with the consent of the governing authorities of the pueblos, such sale to be to the highest bidder for cash. This will enable the secretary to sell lands, where deemed advisable; other provisions of law authorize him to buy lands for the pueblos, thus permitting the blocking of lands belonging to the tribes.